NO. 78-35

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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CITY OF SANTA CLARA, CALIFORNIA, *Petitioner,*

v.

CECIL D. ANDRUS, R. KEITH HIGGINSON and PACIFIC GAS AND ELECTRIC COMPANY, *Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

### OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Ninth Circuit is set forth at page 1a of the Appendix to this Petition and is reported at 572 F.2d 660. The order reversed in part and affirmed in part a judgment of the United States District Court for the Northern District of California which is set forth at page 39a of the Appendix to this Petion and is reported at 418 F. Supp. 1243.

## JURISDICTION

The decision and order of the United States Court of Appeals for the Ninth Circuit issued and was entered February 1, 1978. The decision was amended on Denial of Rehearing and Rehearing En Banc on April 4, 1978. Accordingly, the time for filing this Petition expires on July 3, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Do federal power marketing statutes vest unfettered discretion in an administrator of a federally owned and operated hydroelectric project to pick and choose among a group of customers designated by Congress as preferred customers for electric energy generated at the project?

2. Does the Administrative Procedure Act, and specifically 5 U.S.C. § 552(a)(1), permit *ad hoc* decision-making by federal power marketing agencies with respect to the sale of electric energy generated at federally owned and operated hydroelectric projects?

3. Does a municipally owned and operated electric utility, which qualifies under acts of Congress as a preferred customer for electric energy generated at a federally owned and operated hydroelectric project, and is in fact treated as such by the federal power marketing agency in charge of the project, have a sufficient claim of entitlement to electric service from that project to warrant due process protection?[1]

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[1] Both the District Court and the Court of Appeals rejected Petitioner's allegation of a violation of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C). If the Court grants this Petition, Petitioner intends to challenge the disposition of the NEPA issue on the basis of *Aberdeen & Rockfish Railroad* v. *SCRAP*, 422 U.S. 289 (1975).



## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This controversy presents issues with respect to the following constitutional provisions and statutes, all of which are set forth in the Appendix beginning at 84a;

> The Fifth Amendment to the Constitution of the United States; The Reclamation Project Act of 1939, 43 U.S.C. § 485h(c); Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s; The Administrative Procedure Act, 5 U.S.C. §§ 552 (a)(1), 553, 701.

## STATEMENT OF THE CASE

This Petition presents the question of whether a remedy exists for admitted, unjustified and unexplained federal discrimination against a municipally owned and operated electric utility which Congress has designated as a preferred customer for federally-generated, low cost hydroelectric power and energy. 43 U.S.C. § 485h(c); 16 U.S.C. § 825s.

The Petition arises from a complaint for injunctive and declaratory relief filed by the City of Santa Clara, California, Petitioner, against various officers and officials employed by the United States Department of the Interior. The Complaint was filed in the United States District Court for the Northern District of California. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1361, 1337 and 2201-2202 and 5 U.S.C. §§ 701, *et. seq.*

Petitioner is a municipal corporation organized under the laws of the State of California and is engaged, *inter alia,* in the retail distribution and sale of electric power and energy to its citizens and other customers. As a result, Petitioner qualifies as a preferred customer of federal power marketing agencies under 43 U.S.C. § 485h(c) and 16 U.S.C. § 825s.

Petitioner, pursuant to contact, purchases an allegedly ever diminishing amount of electric power and energy needed for its consumers from the Central Valley Project (hereafter CVP), now administered by the United States Department of Energy through the Western Area Power Administration.[2] In addition to Petitioner, CVP serves numerous customers similarly situated, including the Cities of Biggs, Gridley, Palo Alto, Redding, Roseville, the Sacramento Municipal Utility District, the Shasta Dam Area Public Utility District, and the Plumas Sierra Cooperative. (40a, fn. 3). All of these entities are wholesale for resale purchasers of CVP power and energy, are competitors of Petitioner, and will hereafter be referred to as the "super-preference" customers. (45a-48a, and particularly fn. 14).

As noted by the Court of Appeals:

> The Secretary of the Interior, through the Bureau of Reclamation, sells the power generated by the CVP at a price substantially lower than that charged by private utilities such as PGandE [Pacific Gas and Electric Company]. Consequently, CVP power does not lack for willing purchasers. (2a-3a) (footnote omitted).[3]

[2] 42 U.S.C. § 7152(a)(3).



One of the reasons for the present litigation is that the Federal Respondents have discriminated and are discriminating against Petitioner in the sale of CVP power and energy in favor of the superpreference customers. As the opinions of both the District Court and the Court of Appeals make clear, the Federal Respondents maintain that they are entitled to commit the entire capacity of CVP to the superpreference customers and can deny Petitioner CVP benefits, notwithstanding Petitioner's statutory entitlement there-

[3] This observation is not confined to CVP since it is but one of many federally owned and operated hydroelectric projects and since hydroelectric energy, as is generally known, is usually the least expensive energy available due to the inexpensive nature of the fuel; falling water. In fact, as of January 1, 1976, 159 federally owned hydroelectric projects were in operation with a developed capacity of 27,700,528 kilowatts. New capacity under construction at that time equaled 9,304,750 kilowatts of capacity with an additional 5,306,885 authorized, but not yet in process. *Hydroelectric Power Resources of the United States,* Federal Power Commission (January 1, 1976).

In the recent past administrative and judicial proceedings have increased in number with respect to both rates and allocation of capacity and associated energy. Proposed rate increases are pending for (1) the Central Valley Project; (2) the Southwestern Power Administration; (3) the Jim Woodruff Project of the Southeastern Power Administration; and (4) Cumberland Project of the Southeastern Power Administration. Additionally, the Department of Energy has pending a proposed allocation scheme for peaking power from the Colorado River Storage Project, and Bonneville Power Administration is in the process of developing a formula to allocate energy that it markets. At least two pending cases involve attempts to obtain allocations of preference power from federal power marketing agencies. *Greenwood Utilities* v. *Andrus,* No. 77-179 (M.D. Ga.); *Portland* v. *Bonneville Power Administration,* No. 77-928 (D. Ore.).

to. Instead, as the Federal Respondents attempt to withdraw more and more CVP power and energy from Petitioner, this same power and energy is supposedly committed to the load growth of competitors of Petitioner, the superpreference customers. (4a; 42a-43a). As the controversy stands before this Court, there is no justification nor explanation for the discriminatory treatment of Petitioner, the only justification advanced by the Federal Respondents (congressional ratification of the discrimination) having been found lacking by both the District Court and the Court of Appeals. (21a; 61a-62a).

Pacific Gas and Electric Company (PGandE), is also a party to the action and sides with the Federal Respondents. PGandE, a large, integrated private utility, purchases CVP electric power and energy under an agreement designated Sale, Interchange and Transmission Contract No. 14-16-200-2948A (Contract 2948A). PGandE transmits CVP power and energy to virtually all of the CVP customers over PGandE transmission lines under Contract No. 2948A. When CVP power is available in quantities in excess to the needs of the superpreference customers, it is then supposedly sold to PGandE, a non-preference customer. PGandE in turn has agreed to sell to the Federal Respondents a like amount of power and energy at such future time as the needs of the superpreference customers are in excess of the CVP capacity. (13a-15a).

Another reason for the present litigation is the Federal Respondents' relationship with PGandE. That is, since the Federal Respondents claim that their superpreference customers have both all present



and future rights to CVP output, the Federal Respondents make present sales to PGandE, a non-preference customer, ahead of Petitioner, a preference customer.

Petitioner also has a contractual relationship with PGandE. In order to assure that it had a sufficient supply of power and energy to meet its needs, Petitioner executed a contract with PGandE which obligates PGandE to sell Petitioner enough power and energy to equalize its needs in the event an insufficient amount of CVP power and energy is available. In 1971, when the Federal Respondents initiated allegedly improper withdrawals of CVP power and energy unilaterally, PGandE commenced monthly billings for power allegedly delivered by PGandE to Petitioner. Petitioner refused to pay for any of the power allegedly delivered by PGandE to it and, pursuant to separate agreements with PGandE, commenced deposits in an escrow account in an amount equal to the PGandE billings, less the amount PGandE would receive for transmission services if Petitioner is found to have been receiving all requirements service from CVP, as it has alleged.

As of the date of the filing of this Petition, the escrow account contains over $50,000,000. and is building at the rate of approximately $1,500,000. per month, exclusive of interest.

### A. Before the District Court

In an opinion rendered in response to cross motions for summary judgment, Petitioner's challenge to the discrimination practiced by the Federal Respondents

elicited the following findings and holdings by the District Court:

1. The federal power marketing statutes provide "law to apply" in reviewing the challenged CVP power marketing practices. (54a-58a).

2. CVP power marketing practices discriminate against Santa Clara in favor of "superpreference" customers similarly situated. (59a-61a).

3. The only justification advanced for the discrimination, congressional ratification, is "inadequate." (63a-64a).

4. The Federal Respondents never published nor made known any procedures or policies followed in allocating CVP power "at any point in time", and therefore violated 5 U.S.C. § 552(a)(1). (67a-69a).

5. Petitioner has a sufficient interest in CVP power and energy entitling it to due process protection and Petitioner's right to due process was violated. (70a-77a).

As a consequence, the District Court remanded the controversy to the Secretary for a new look at CVP power marketing practices consistent with the mandates of the federal power marketing statutes and procedural due process. At the same time the District Court expressed no views on the reasonableness *vel non* of present practices, and having earlier found that the legality of the challenged sales to PGandE turned on the legality of the challenged, discriminatory power marketing practices, ordered preservation of the escrow mechanism pending the outcome on remand. (76a-77a). Finally, the District Court dismissed the action without prejudice.



**B. Before the Court of Appeals**

Following cross-appeals, the Court of Appeals reversed the District Court in most respects, the one major exception being agreement that Congress never ratified the discriminatory practices under challenge. (21a).

The Court of Appeals' contrary holdings were as follows:

1. Since the federal power marketing statutes do not specifically deal with which eligible preference customers are to receive power allocations, there is no "law to apply" to the controversy and the Secretary may discriminate, without reason, among preference customers. (9a-13a).

2. Sales to PGandE, a non-preference customer, ahead of Petitioner, a preference customer, are suspect and not justified by the CVP power marketing scheme. (13a-21a).

3. Title 5 U.S.C. § 552(a)(1) does not require the promulgation of rules to be followed in power marketing decision making and no allegation having been made that such rules exist, it was error for the District Court to find a § 552(a)(1) violation. (21a-26a).

4. Since the Federal Respondents have uncontrolled discretion to discriminate in dealing with preference customers *inter sese,* Petitioner has no due process rights with respect to sales of CVP power among preference customers. (26a-29a).

5. Since Petitioner has a preference to CVP power against PGandE, Petitioner does have due process rights with respect to sales of CVP power to PGand E. (29a-30a).

Accordingly, the Court of Appeals reversed the District Court's remand to the Secretary and the dismis-

sal of the action. Instead, the Court of Appeals remanded the controversy to the District Court with instructions to consider the limited issue of the legality of the suspect CVP sales to PGandE under the federal power marketing statutes.

## REASONS FOR GRANTING THE WRIT

As can be seen from the statement of Questions Presented, Petitioner believes that the Court of Appeals erred in three significant ways in reversing the District Court. As will be seen, each of the holdings presents conflicts with either decisions of this Court or of the various Courts of Appeal. As will also be seen, the conflicts must be resolved to give federal power marketing agencies, and other federal agencies a clear charter in the now uncertain area of acceptable administrative processes.

Of greater importance, the three holdings, read together, result in the following principle of law in the Ninth Circuit: unexplained and unjustified discrimination by a federal power marketing agency, practiced against an entity singled out by Congress for preferential treatment, may not be remedied by the federal judiciary. Petitioner submits that this is an unacceptable principle of law given the importance of federal hydropower to the economic and social well being of preference customers.[4]

### A. *Question One* – Reviewability

Petitioner maintains that both 43 U.S.C. § 485h(c) and 16 U.S.C. § 825s provide the requisite "law to apply" in reviewing the power marketing decisions

[4] See fn. 3, *supra*.



by the Federal Respondents in the present instance, *See Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971).

43 U.S.C. § 485h(c) (a part of the Reclamation Project Act of 1939) governs CVP sales since the Central Valley Project Authorization Act, 50 Stat. 850, incorporates the provisions of the reclamation laws for CVP operation. 43 U.S.C. § 485h(c) provides that in the sale of power ". . . preference shall be given to municipalities and other public corporations or agencies . . ."

While the CVP was not authorized under 16 U.S.C. § 825s, it nevertheless also governs CVP sales by virtue of long standing departmental policy, which the Federal Respondents have never disputed.[5]

16 U.S.C. § 825s provides:

> Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, *who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles.*
>
> [Emphasis supplied].

[5] The Court of Appeals did not accept this proposition, and indeed found it "questionable", but did not decide the issue in any event since it viewed the statute as too "vague and general to provide law to apply." (11a). The District Court, on the other hand, did find the statute applicable and Petitioner respectfully refers this Court to the discussion at 55a, and particularly fn. 22. *See also,* Section 4 of the American River Act of 1959, 63 Stat. 852, which transfers the Folsom Dam, authorized under the Flood Control Act of 1944, to the Central Valley Project administrator.

As to 43 U.S.C. § 485h(c), Petitioner maintained and maintains that an unexplained decision to discriminate among preference customers similarly situated is as reviewable under the statute as a decision to sell preference power to non-preference entities first, the deprivation of a congressionally conferred benefit being as real in either event and the violation of the congressional mandate that preference "shall" be given equally as real.

As to 16 U.S.C. § 825s, Petitioner maintained and maintains that the mandate to the Secretary to sell power to preference entities ". . . in such manner as to encourage the most widespread use thereof . . ." provides a more than adequate guideline for reviewability where a congressionally intended beneficiary is completely excluded from power supply for no rational reason; and particularly where the intended beneficiary is in the heart of the geographic area that Congress intended to be benefitted by CVP. *See Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958). Simply stated, Petitioner's claim here is that exclusion of eligible customers violates the congressional directive that the administrator "encourage the most widespread use" of the power.

The Court of Appeals disagreed with the Petitioner, and held with respect to 43 U.S.C. § 485h(c):

> The preference clause requires only that public entities be given a preference over private entities in the marketing of power generated by federal reclamation projects. *Arizona Power Pooling Association* v. *Morton, supra,* 527 F.2d at 726-28. It does not require that all preference customers be treated equally or that all potential preference customers receive an allotment. *Arizona Power Authority* v. *Morton, supra,* 549 F.2d at 1241, 1252. Where, as here, one preference entity challenges the Secretary's decision to discriminate against it in favor of other preference entities, the reclamation laws provide no law to apply to the dispute. If he so chooses, the Secretary can market *all* available CVP power to a single entity without running afoul of the preference clause. (10a) (emphasis in original).



Similarly, the Court of Appeals held with respect to 16 U.S.C. § 825s that:

> The Flood Control Act of 1944, while arguably applicable to the sale of power generated by the CVP, is so imprecise that its interpretation requires a "profound exercise of discretion" of the sort described in the *Panama Canal* case. (12a).

These holdings of the Court of Appeals are consistent with its previous holding in *Arizona Power Authority* v. *Morton,* 549 F.2d 1231 (9th Cir.), *cert. denied,* 98 S.Ct. 124 (1977), but are in error nonetheless.

In the *Morton* decision, the Ninth Circuit rejected a challenge to a power marketing scheme of a federal power marketing agency due to plaintiff's failure ". . . to carry its burden of demonstrating that the Marketing Criteria clearly violate the legislative intent behind CRSP." *Ibid.* at 1251. Here the rationale is similar in that Petitioner failed to elucidate to the satisfaction of the Court of Appeals the precise constraints placed on the Federal Respondents in making power marketing decisions under different hypothetical circumstances under both 43 U.S.C. § 485h(c) and 16 U.S.C. § 825s. (8a).

Petitioner submits that the Ninth Circuit has thus shifted the burden from the Federal Respondents to show legislative intent to preclude judicial review (*Barlow* v. *Collins,* 397 U.S. 159 (1970)) to the plaintiff, in each instance, requiring a precise showing of the limits placed on discretion. Since the statutes here do not specifically address the subject, judicial review does not lie according to the Ninth Circuit.

One possible result of the decision by the Court of Appeals will be litigation against federal power marketing agencies under the federal antitrust laws. This Court recently held that a municipal electric utility may be sued under the federal antitrust laws where ". . . the state itself has not directed or authorized an anticompetitive practice . . ." *City of Lafayette* v. *Louisiana Power and Light Co.,* —— U.S. ——, 46 U.S.L.W. 4265, 4272 (March 29, 1978). Since there was no indication in *Lafayette* that the holding would be restricted to state or municipal agencies, and since the Court of Appeals here finds no enforceable congressional policy with respect to discriminatory treatment of preference customers, preference customers suffering discrimination may now only have recourse to damage and injunctive action under the antitrust laws. *Cf. Alabama Power Company* v. *Alabama Electric Cooperative, Inc.,* 394 F.2d 672, 677-92 (5th Cir. 1972) (Godbold, J., dissenting).

In other words, the Court of Appeals' refusal to hear disputes where discrimination is alleged between or among preference customers on reviewability grounds will not confine these disputes to administrative deliberations and may, in fact, force them into federal court. The better and less disruptive course is to require federal power marketing agencies to articu-



late with rationality why a particular course of conduct is adopted. Only the judiciary is in a position to ensure that the agencies meet this standard, and Petitioner suggests that the Ninth Circuit's doctrinal approach on reviewability must be reversed.

It must be remembered, too, that Petitioner asserts reviewability not only under the federal reclamation laws and the Flood Control Act of 1944, but under the Fifth Amendment as well. (65a). That is, Petitioner alleges a violation of its constitutional right to be free of discriminatory treatment which is not justified on any rational basis by the Federal Respondents, which treatment is forbidden by the Fifth Amendment as well as the Fourteenth Amendment. *Bolling* v. *Sharpe,* 347 U.S. 497, 499-500 (1954).

This Court has repeatedly asserted that governmental action

> . . . must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *F.S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).

Petitioner has asserted again and again that its right to equal protection of the laws has been and is being violated and the Federal Respondents have yet to advance even a modicum of justification for the discriminatory treatment. This Court has stated that "when constitutional questions are in issue, the availability of judicial review is presumed . . . ." *Califano* v. *Sanders,* 430 U.S. 99, 109 (1977).

Petitioner thus submits that even if one accepts the Ninth Circuit's finding that the reclamation laws and the Flood Control Act of 1944 vest unlimited dis-

cretion in the Federal Respondents to discriminate against preference customers, that the Fifth Amendment provides a vehicle for this controversy to be heard and that the Court of Appeals erred in not recognizing this principle.

**B. *Question Two* – Administrative Procedure Act**

Title 5 U.S.C. § 552(a)(1) provides, in part:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> * * *
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> * * *
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

The District Court specifically found that,

> The Bureau did not publish any such description of the procedures followed in making power allocations to preference customers . . . .
>
> (67a).

In response to the Federal Respondents' attempt to invoke the statutory exception which applies when "actual and timely notice" of the procedures are given, the District Court held:

> The statutory exemption cannot apply where, as here, such procedures as were followed were incompletely and imprecisely delineated and communicated haphazardly, if at all, to affected parties.
>
> (68a).



In reversing the holding of the District Court, the Court of Appeals held that:

> We cannot read a rulemaking requirement into Section 552, or interpret the section in such a way as to render meaningless the public property exemption contained in Section 553.
>
> (26a).

In reversing the District Court, the Court of Appeals acknowledged that the result permits *ad hoc* decisionmaking by the Federal Respondents. (25a).

The Court of Appeals thus erred in three respects. First, it misinterpreted both Petitioner's allegation with respect to 5 U.S.C. § 552(a)(1) and the District Court's holding. Second, it reached a result at conflict with decision of this Court and every Circuit Court of Appeal that has considered the matter. Third, it ignored a change in law with respect to 5 U.S.C. § 553's application to the controversy prior to its holding.

Petitioner has consistently argued that the Federal Respondents, at all times relevant, did have a crystallized power marketing policy with respect to CVP, which policy has never made known. Indeed, at all times relevant the Federal Respondents have never argued otherwise. Rather, the Federal Respondents have consistently argued that they were pursuing a policy that had been ratified by Congress. As has been seen, both the District Court and the Court of Appeals rejected the defense, thus recognizing the existence of an unpublished, but real, policy.

Thus the District Court was *required* to find a § 552(a)(1) violation. And, the remedy which the District Court fashioned as a result of its holding [6] was completely consistent with that developed in other circuits. *See, e.g., Gonzalez* v. *Freeman,* 334 F.2d 570 (D.C. Cir. 1964); *W.G. Cosby Transfer & Storage Co* v. *Froehlke,* 480 F.2d 498 (4th Cir. 1973); *Northern California Power Agency* v. *Morton,* 396 F. Supp. 1187 (D.D.C. 1975), *aff'd per curiam,* No. 75-1572 (D.C. Cir. June 16, 1976). *See also Morton* v. *Ruiz,* 415 U.S. 199 (1974); *Gardiner* v. *Tarr,* 341 F. Supp. 442 (D.D.C. 1972).

The Court of Appeals itself recognized that its decision was out of step with that of *Gonzalez* and *Cosby,* saying:

> In each case there is language to the effect that § 552 required the agency to formulate and adopt rules describing the grounds upon which the agency would act and the procedures that it would follow. But in neither case did the court do what the trial court did here, order the agency to formulate and adopt such rules. To the extent that these cases can be said to stand for the proposition that § 552 requires an agency to formulate and adopt rules, *we decline to follow them.* (26a) (Emphasis added).

The attempted distinction implicit in the second quoted sentence, as can be seen from a review of *Gonzalez* and *Cosby,* is nonexistent. What does exist, in the Ninth Circuit, is freedom on the part of federal

[6] The opinion states: "As a result of the court's holding here, and in Part II. D. infra, [relating to due process] it will be necessary for the Bureau to publish, or disseminate so as to provide actual notice to all interested parties, specific rules of procedure. . . ." (60a-69a).



agencies to govern the distribution of the benefits of government programs as they see fit.

The abdication of judicial review in this instance cannot be countenanced. As the Court of Appeals for the District of Columbia has said:

> Judicial review must operate to ensure that the administrative process *itself* will confine and control, the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible . . . . When administrators provide a framework for principled decision making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.[7]

In attaining this objective, courts have two available tools, Section 3(a) of the Administrative Procedure Act and the due process clause of the Constitution. It is not surprising that the courts have frequently relied upon both to sustain their holdings requiring publication of informal procedural rules.[8] The action of the Ninth Circuit, however, would require reliance solely upon the Constitution itself. Wiser, Petitioner believes, is the course of action taken by the *Gonzalez* court in which Judge Burger especially relied upon 5 U.S.C. § 552 so as not to ele-

[7] *Environmental Defense Fund, Inc.* v. *Ruckelshaus,* 439 F.2d 548, 598 (D.C. Cir. 1971) (emphasis added) (footnotes omitted). *See also* K. Davis, *Informal Administrative Action, Another View,* 26 A.U.L. Rev. 836 at 843, *et seq.* (1977); K. Davis, *Administrative Law of the Seventies,* § 3A, 7 at 75 (June, 1976); K. Davis, *Discretionary Justice* (1969).

[8] *See, e.g., McDonald* v. *General Mills,* 387 F.Supp. 24 (E.D.Cal. 1974); *Northern California Power Agency* v. *Morton, supra.*

vate the controversy to a constitutional dimension. *Gonzalez, supra,* at 580.

Finally, the Court of Appeals' reliance on the public property exemption in 5 U.S.C. § 553 in holding that 5 U.S.C. § 552 had not been violated was improper at the time of decision.

On August 4, 1977, the Department of Energy Organization Act [9] was enacted. As regards this litigation, the DOE Act's relevance and impact stem from the creation of the Department of Energy (DOE)[10] and the transfer to the DOE of the power marketing functions formerly held by the Secretary of Interior. 42 U.S.C. § 7152(a)(1).

In addition to this transfer of authority, the DOE Act made the provisions of the rulemaking portions of the APA applicable to, *inter alia,* the power marketing functions now exercised by the DOE. The DOE Act provides:

> For the purposes of this subchapter the exception from the requirement of section 553 of Title 5 provided by subsection (a)(2) of such section with respect to public property, loans, grants, or contracts shall not be available.
>
> 42 U.S.C. § 7191(b)(3).

As noted, the Court of Appeals relied on the public property exception in the APA to justify its determination that the Secretary's actions were not governed by Section 4 of the APA. However, the effective date of the DOE Act preceded the Ninth Circuit's decision in this case. Thus, although the Court of Appeals' determination that the Secretary's actions need not conform to the strictures of Section 4 of the APA may have been correct as regards actions up to August 4, 1977, Petitioner submits that actions taken by the DOE under its power marketing functions subsequent to its establishment on August 4, 1977 must comply with the rulemaking provisions of Section 4 of the APA. Petitioner further submits that the Court of Appeals' failure to make this determination and impose the rulemaking requirements constitutes further error.

Although a substantial portion of Petitioner's arguents concerns the past illegal decisions of the Secretary, Petitioner is adversely and severely injured by the current failure of DOE to review its schemes for the allocation of preference power pursuant to a rulemaking proceeding conducted under the provisions of Section 4 of the APA. The present allocation plan, having been developed by the Secretary on an *ad hoc* basis cannot be implemented by the DOE absent Section 4 rulemaking proceedings since the "public property" exception is no longer available in the marketing of federal hydropower.

The propriety of and requirement for the conduct of rulemaking proceedings in this instance are reflected by decision of this Court.

In *Morton* v. *Ruiz,* 415 U.S. 199 (1974), this Court, in the context of a case involving public benefits to Native Americans, underscored the necessity of plac-

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[9] Pub. L. 95-91, 91 Stat. 567 (hereinafter DOE Act). The DOE Act has been recently codified at 42 U.S.C. §§ 7101, *et seq.*

[10] 42 U.S.C. § 7131.

ing the exercise of administrative discretion within the structure of rulemaking proceedings:

> This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, but also to employ procedures that conform to the law. No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds.
>
> The Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.
>
> 415 U.S. at 232 (citations omitted).

The power marketing scheme applied prospectively from August 4, 1977 is tainted by the *ad hoc* decision-making process undertaken by the Secretary prior to the DOE Act. The failure of the Court of Appeals to require rulemaking proceedings pursuant to Section 4 of the APA to determine the proper allocation of preference among preference agencies was error.[11]

### C. Question Three – Due Process

The Court of Appeals' holding with respect to due process is equally erroneous and at odds with decisions of this Court, other Courts of Appeals, and the Ninth Circuit itself.

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[11] The change in law was brought to the attention of the Court of Appeals in Petitioner's Petition for Rehearing.



The Court of Appeals relied on *Board of Regents* v. *Roth,* 408 U.S. 564 (1972) in holding that Petitioner lacks entitlement to due process protection as against other preference entities. In its treatment of *Roth*, the Court of Appeals observed:

> Having completed a year of teaching, Roth, like Santa Clara, could differentiate himself from others who sought the government benefit in question. However, Roth's desire to be rehired, his eligibility for contract renewal, and his special status as a former employee, were all insufficient to clothe him with a "legitimate claim of entitlement." Because the Board of Regents could refuse to rehire Roth for any reason whatsoever, Roth's interest did not rise to a level of entitlement.
>
> (29a).

The problem with this analysis is that Roth had no "special status as a former employee" and could not "differentiate himself from others who sought the benefit in question." Had Roth been able to do either, the *Roth* result would have been different, as the companion case, *Perry* v. *Sinderman,* 408 U.S. 593 (1972), makes clear.

In *Perry*, the complainant alleged a "special status as a former employee" under a theory of "de facto tenure." That is, while the complainant was employed on a year to year basis, and while he could not demonstrate either a state statute or official school policy granting him "special status", he did allege "that the college had a de facto tenure program, and that he had tenure under that program" and that he could legitimately rely upon non-binding guidelines issued by a state-wide board establishing tenure. *Perry, supra,* at 599-601.

Thus, this Court concluded in Perry:

> In this case the, respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." *Ibid.* at 602-603.

Under both *Roth* and *Perry,* it is thus submitted that the District Court's holding is unassailable:

> Were Santa Clara before us as just another potential customer of Bureau power, unclothed of any Congressional recognition of special privilege in the fight for power, we would have to conclude that the City's interest did indeed go no further than an "abstract need or desire" or "unilateral expectation". But the fact that Congress has seen fit to distinguish municipalities from non-public potential customers of CVP power lends a certain legitimacy to Santa Clara's claim of entitlement. Granted, the "dimensions" of this property interest are statutorily restricted to "preferential" consideration therefor; nevertheless, a restriction on a property right does not eviscerate its status as a right. The preferential treatment Congress has afforded public entities clearly raises the probability that such a customer will receive power over and above that of other customers. The long history of the various laws directing the disposition of public power first to the public, attests to the existence of some claim of entitlement for public agencies. Accordingly, the court holds that a sufficient statutory property interest exists to call forth some degree of due process protection.[12]
>
> (70a). (Footnotes omitted).

[12] *See* 40a-42a, for a summation of the myriad congressional enactments and federal pronouncements dealing with the genesis and policy of the preference clause. (45a, n.14).



It is also submitted that the Ninth Circuit's holding cannot be squared with its own holding in *Pence* v. *Kleppe,* 529 F.2d 135 (9th Cir. 1976) (Alaska Natives seeking discretionary allotments under the Alaska Native Allotment Act), the Second Circuit's holding in *Holmes* v. *New York City Housing Authority,* 398 F.2d 262 (2d Cir. 1968) (applicants for scarce public housing), the Seventh Circuit's holding in *White* v. *Roughton,* 530 F.2d 750 (7th Cir. 1976) (applicants for welfare assistance), and the District of Columbia Circuit's holding in *Northern California Power Agency, supra* (federal power marketing agency rate setting and due process).

The vice of the Court of Appeals' holding in the present case was succinctly stated by the Second Circuit in *Holmes:*

> It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. See Hornsby v. Allen, 326 F.2d 605, 609-610 (5th Cir., 1964). *Holmes, supra,* at 265.

In view of the vast nature of federal hydropower marketing activities and the enormous worth of that power to preference customers, it seems to Petitioner clear beyond argument that preference customers are entitled to due process protection in all of their dealings with federal agencies. This Court must intercede to remove the doubt that now exists and to prevent the "intolerable invitation for abuse" the Ninth Circuit has extended.

Finally, the Ninth Circuit's decision on due process is flatly inconsistent with this Court's recent holding in *Memphis Light, Gas & Water Division* v. *Craft*, —— U.S. ——, 56 L. Ed.2d 30 (May 1, 1978).

In *Memphis,* this Court held that since under Tennessee law an electric utility may not terminate service at will, a customer of that utility has a legitimate claim of entitlement to continued electric service requiring due process proceedings prior to termination of service. Here, Petitioner is served pursuant to contract as a preferred customer of Federal Respondents under federal law. (51a). Yet the Federal Respondents are continuing in their attempts to withdraw CVP power and energy from Petitioner in a manner that Petitioner alleges is in violation of its contractual rights and is in violation of its rights as a preferred customer under federal law.

Petitioner submits that Federal Respondents' continual refusal to afford due process protection to Petitioner prior to attempted contractual withdrawals under the circumstances of this dispute runs afoul of *Memphis* and provides still another basis for the granting of Petitioner's request for a Writ of Certiorari.



## CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays that the Writ of Certiorari issue so that this Court can resolve the uncertainty introduced into the relationship of federal power marketing agencies with preference customers by the decision of the Ninth Circuit.

Respectfully submitted,

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Dated: July 3, 1978

**Certificate of Service**

I, Fredrick D. Palmer, hereby certify that on July 3, 1978 the foregoing Petition for Writ of Certiorari in the above captioned proceeding was served upon all counsel, pursuant to Rule 33 of the Supreme Court Rules, by mailing copies by first class mail, postage prepaid as follows:

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# APPENDIX

## APPENDIX

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

CITY OF SANTA CLARA, CALIFORNIA, *Appellant,*

v.

Cecil ANDRUS, Individually and as Secretary of the Interior, and R. Keith Higginson, Individually and as Commissioner of the Bureau of Reclamation, United States Department of Interior, *Appellees.*

Cecil ANDRUS, Individually and as Secretary of the Interior, and R. Keith Higginson, Individually and as Commissioner of the Bureau of Reclamation, United States Department of Interior, *Appellants,*

v.

CITY OF SANTA CLARA, CALIFORNIA, *Appellee.*

PACIFIC GAS & ELECTRIC COMPANY, *Appellant,*

v.

CITY OF SANTA CLARA, CALIFORNIA, *Appellee.*

Nos. 77-1110, 77-1270, 77-1189 and 76-3670.

Feb. 1, 1978.

As Amended on Denial of Rehearing and Rehearing En Banc April 4, 1978.

**Appeal from the United States District Court for the Northern District of California**

Before DUNIWAY and CARTER, Circuit Judges, and BURNS,* District Judge.

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* The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

DUNIWAY, Circuit Judge:

This case concerns sales by the Secretary of the Interior of low-cost hydroelectric power generated by the Central Valley Project in California. The city of Santa Clara filed this action for declaratory and injunctive relief, challenging the Secretary's decisions to withdraw power from the City and to deny it an allocation of "firm" (non-withdrawable) power. The Pacific Gas and Electric Company (PG&E) was allowed to intervene and counterclaim for certain funds being held in an escrow. All parties moved for summary judgment. The district court granted the Secretary's motion as to Santa Clara's National Environmental Policy Act (NEPA) claim, denied the other motions, and "remanded" the case to the Secretary for the promulgation of rules and procedures concerning the marketing power generated by the Central Valley Project. The court's judgment also dismissed the action without prejudice. All parties appeal. We affirm in part, reverse in part, and remand in part.

## FACTS

The Central Valley Project (CVP) is a multipurpose federal reclamation project consisting of numerous dams, hydroelectric power plants, transmission lines, and irrigation canals, located in the Central Valley of California and its surrounding mountains.[1] While production of hydroelectric power is not the primary purpose of the CVP, a substantial amount of electricity is generated by the project and ultimately sold to a large and varied group of users in Northern and Central California.

The Secretary of the Interior, through the Bureau of Reclamation, sells the power generated by the CVP at a

[1] The CVP is described in detail in *Ivanhoe Irrigation District v. McCracken*, 1958, 357 U.S. 275, 280-83, 78 S.Ct. 1174, 2 L.Ed.2d 1313.



price substantially lower than that charged by private utilities such as PG&E.[2] Consequently, CVP power does not lack for willing purchasers. Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), provides that in sales or leases of electric power or power privileges, made by the Secretary, "preference shall be given to municipalities and other public corporations or agencies" and REA cooperatives.

Santa Clara first sought an allocation of CVP power on June 1, 1960, although it was then under contract to buy power from PG&E and so could not then take power from CVP. In 1962, the Secretary informed Santa Clara and others that 250,000 kilowatts of firm power would become available to preference customers upon completion of the Trinity River Division of the CVP, and invited applications for this new power. Santa Clara renewed its request for power on February 19, 1962, acknowledging that it would be unable to receive the power until the expiration, on August 27, 1967, of its requirements contract with PG&E. The Secretary responded that while he would not commit himself to such a future allocation, Santa Clara's application would be kept on file for consideration nearer the time when the City could actually begin purchasing federal power. When the Trinity River Division of the CVP came on line in early 1963, the additional power which became available was allocated to other preference customers which were able to take it immediately.

Between 1963 and 1964, CVP's generating capacity increased further. Notice of the availability of additional power was sent to all preference entities, Santa Clara among them, asking for estimates of present load requirements and future load growth. The additional power

[2] In 1976, the price of CVP power ($.005 per kilowatt hour) was roughly one-fourth of that charged by PG&E ($.019 per kilowatt hour).

was ultimately allocated to then existing preference customers and Santa Clara was again excluded because of its inability to take power immediately.

Concerned that all CVP power was fast becoming spoken for, Santa Clara telegraphed the Secretary in July, 1964, asserting that its contract with PG&E was not binding and requesting an immediate allocation of power, on a withdrawable basis if necessary. The Secretary replied that, while all anticipated power was committed to meet the growth needs of other preference customers, 75,000 kilowatts could be offered to the City on a withdrawable basis.

On November 30, 1965, Santa Clara finally contracted with the Secretary for the supply of 75,000 kilowatts of CVP power on a withdrawable basis. At the same time, Santa Clara entered into an agreement with PG&E which required the utility to supply the City with sufficient electricity to meet any power requirements not satisfied by the CVP allotment.

Santa Clara's original allotment of 75,000 kilowatts was revised upward several times after 1965 by contract amendment. The City's allotment peaked at 120,000 kilowatts in 1970, after which the Secretary, by unilateral contract amendment, began withdrawing power from Santa Clara to meet the needs of its older preference customers. Between 1971 and 1974, the City's allotment was cut back from 120,000 kilowatts to 71,450 kilowatts. This amount is likely to dwindle still further if the Secretary has his way.

During the period when Santa Clara was receiving all of its power requirements from the CVP, it continued to ask the Secretary for a nonwithdrawable allocation. However, as additional power became available, the Secretary decided to hold it for preference customers already receiving nonwithdrawable allotments, rather than to offer it to customers with withdrawable allocations such as



Santa Clara. On February 4, 1972, the Secretary finally informed Santa Clara by letter that he would not allocate nonwithdrawable power to the City, then or at any time.

In 1971, when the government began withdrawing power from Santa Clara, PG&E began monthly billings for that portion of the City's requirements not met by the CVP allocation and supplied by PG&E. Contending that the withdrawals were unlawful and consequently ineffective, Santa Clara insisted that its power needs were still being fully supplied by the Secretary. The City began paying the moneys demanded by PG&E into an escrow account and has done so ever since.

### Proceedings in the Trial Court

On July 25, 1975, Santa Clara filed this action against the Secretary and the Commissioner of the Bureau of Reclamation (the federal defendants), seeking declaratory and injunctive relief. In its complaint the City challenged the withdrawal of CVP power and the Secretary's refusal to supply it with a nonwithdrawable allocation. PG&E intervened as a party-defendant, counterclaiming for declaratory relief with respect to the funds held in escrow. All parties moved for summary judgment.

On July 23, 1976, the district court issued its opinion, *City of Santa Clara v. Kleppe,* N.D.Cal., 1976, 418 F. Supp. 1243, holding as follows: (1) Santa Clara's action is not barred by sovereign immunity; (2) the Secretary's contractual relationship with PG&E does not violate the reclamation laws; (3) the Secretary's decisions allocating CVP power are reviewable; (4) Congress has not approved the existing allocation scheme; (5) the Secretary violated the Administrative Procedure Act (APA) by failing to promulgate and publish rules of procedure governing the allocation of CVP power; (6) the Secretary's actions denied Santa Clara due process; and (7)

the National Environmental Policy Act (NEPA) did not require the Secretary to file an environmental impact statement before withdrawing power from the City. The district court's opinion contained no ruling on defendants' claim that Santa Clara's action was untimely and barred by laches.

Although the trial court held that the Secretary's marketing decisions were reviewable, it did not pass on the lawfulness of the existing allocation scheme. Instead, it remanded the action to the Secretary with instructions to remedy the due process and APA violations. With regard to PG&E's counterclaim, the court ruled that the utility's right to be reimbursed by Santa Clara would depend upon the allocation scheme adopted by the Secretary on remand. The court therefore ordered that the disputed funds remain temporarily in escrow.[3] It also dismissed the action without prejudice.

## I.

### Jurisdiction on Appeal

Although the dismissal of the action "in its entirety" is "without prejudice," we find that the judgment based upon it is a final judgment, appealable under 28 U.S.C. § 1291. The language "without prejudice" avoids the "on the merits" effect of Rule 41(b), F.R.Civ.P., and permits the filing of a new action by any party dissatisfied with the Secretary's action on remand. It is still true, however, that the judgment disposes of the action. Moreover, the remand is, in substance, a mandatory injunction requiring certain action by the Secretary, and so appeal-

[3] The court later modified this decision, ordering that one quarter of the funds in escrow be disbursed to PG&E to enable the utility to recoup the costs incurred in purchasing the power ultimately resold to Santa Clara. *See City of Santa Clara v. Kleppe*, N.D.Cal., 1976, 428 F.Supp. 315.



able under 28 U.S.C. § 1292(a)(1) assuming, but not deciding, that it is not a final judgment under § 1291.

We have jurisdiction. *See Gueory v. Hampton*, 1974, 167 U.S.App.D.C. 1, 4, 510 F.2d 1222, 1225; *Hines v. D'Artois*, 5 Cir., 1976, 531 F.2d 726, 730.

## II.

### Laches and the Statute of Limitations

The federal defendants argue that this action is barred by either the six-year statute of limitations, 28 U.S.C. § 2401(a), or the doctrine of laches. These arguments are based on the assumption that Santa Clara's claim for relief arose no later than 1965 when the City entered into a contract with the Secretary for the supply of withdrawable CVP power.

Long after 1965, however, the Secretary, through the regional director of the Bureau of Reclamation, continued to assure Santa Clara that its applications for nonwithdrawable power would receive due consideration in the future. It was not until 1972 that the Secretary informed the City by letter that all firm CVP power was committed to meet the growth needs of other preference customers. Until that date, the City could reasonably have believed that it could, in future, secure an allocation of firm power. We therefore conclude that Santa Clara's claim for relief did not arise until 1972, when the Secretary finally told the City, in unequivocal terms, that its applications for nonwithdrawable power would not be considered, then or later.

## III.

### Reviewability of the Secretary's Decisions

PG&E and the federal defendants assert that the Secretary's decisions concerning the allocation CVP power are immune from judicial review. Specifically, they contend that the Secretary's marketing decisions are actions

"committed to agency discretion by law" within the meaning of the APA, 5 U.S.C. § 701(a)(2).

Judicial reviewability of administrative action is the rule and nonreviewability a narrow exception, the existence of which must be clearly demonstrated. *Arizona Power Pooling Ass'n v. Morton,* 9 Cir., 1975, 527 F.2d 721, 727, *cert. denied,* 1976, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761. The Supreme Court has stated that review is precluded only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens To Preserve Overton Park v. Volpe,* 1971, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136. *See also, Ness Investment Corp. v. United States Department of Agriculture, Forest Service,* 9 Cir., 1975, 512 F.2d 706, 713. If, however, no law fetters the exercise of administrative discretion, the courts have no standard against which to measure the lawfulness of agency action. In such cases no issues susceptible of judicial resolution are presented and the courts are accordingly without jurisdiction. *Arizona Power Authority v. Morton,* 9 Cir., 1977, 549 F.2d 1231, 1239, *cert. denied,* 1977, —— U.S. ——, 98 S.Ct. 124, 54 L.Ed.2d 97.

In considering whether administrative action is "committed to agency discretion by law" within the meaning of the APA, the test "is not whether a statute viewed in the abstract lacks law to be applied, but rather, whether *'in a given case'* there is no law to be applied." *Strickland v. Morton,* 9 Cir., 1975, 519 F.2d 467, 470 (emphasis in original). Thus the existence of some law generally applicable to the subject matter in question will not necessarily remove administrative action from the "committed to agency discretion" rubric. There is "law to apply," only if a specific statute limits the agency's discretion to act in the manner which is challenged.



A. *The Refusal to Contract with Santa Clara for Firm Power.*

Santa Clara says that two statutes provide "law to apply" in evaluating the Secretary's decisions concerning the sale of power generated by the CVP to Santa Clara. The first is the Central Valley Project Authorization Act, 50 Stat. 850, which incorporates generally the provisions of the reclamation laws. Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), defines a class of customers which are to receive a preference in the sale of power generated by federal reclamation projects. The class of preference customers includes "municipalities and other public corporations or agencies."

Our recent decision in the case of *Arizona Power Authority v. Morton, supra,* forecloses Santa Clara's argument that the Secretary, by providing other public entities with nonwithdrawable power allocations while denying such a "firm" allocation to Santa Clara, thereby violated the terms of the preference clause. In that case a group of preference customers for power in Arizona challenged the Secretary's decision to allocate most of the power produced by Colorado River Storage Project (CRSP) generating facilities to preference customers located in the "upper basin" states of Wyoming, Colorado, Utah and New Mexico. We held that the Secretary was obliged to market power generated by CRSP facilities to preference customers in accord with the dictates of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), but concluded that the preference clause permitted the Secretary to discriminate against some preference entities in favor of others. "[I]t would appear in light of his broad discretion that the Secretary may adopt whatever geographic preference he desires and that we have no jurisdiction to review his action." 549 F.2d at 1241.

The preference clause requires only that public entities be given a preference over private entities in the marketing of power generated by federal reclamation projects. *Arizona Power Pooling Ass'n v. Morton, supra,* 527 F.2d at 726-28. It does not require that all preference customers be treated equally or that all potential preference customers receive an allotment. *Arizona Power Authority v. Morton, supra,* 549 F.2d at 1241, 1252. Where, as here, one preference entity challenges the Secretary's decision to discriminate against it in favor of other preference entities, the reclamation laws provide no law to apply to the dispute. If he so chooses, the Secretary can market *all* available CVP power to a single public entity without running afoul of the preference clause.

In *Arizona v. California,* 1963, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, the Court considered the scope of the Secretary's authority to allocate the waters of the Colorado River pursuant to the Boulder Canyon Project Act. The Court stated:

> The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it. . . . [W]e are persuaded that had Congress intended . . . to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms . . . 373 U.S. at 580, 83 S.Ct. at 1487.

Nothing in the legislative history of the Reclamation Project Act of 1939 suggests that Congress intended to limit the Secretary's discretion to interpret the preference clause in making decisions as to whether or how or on what terms he will sell power to particular preference customers as compared to other preference customers.



Santa Clara also relies on Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, as providing an alternative standard against which the Secretary's marketing decisions can be measured. In pertinent part, section 5 provides that power is to be disposed of "in such manner as to encourage the most widespread use thereof consistent with sound business principles." By its terms this directive governs only the sale of power generated by flood control projects operated by the Department of the Army. The standard's applicability to the sale of power generated by the CVP, which is operated by the Bureau of Reclamation, is therefore questionable. Santa Clara maintains that the federal defendants themselves, as a matter of departmental policy, have long regarded the provisions of the Flood Control Act as applicable to the marketing of CVP power. We find it unnecessary to decide whether the Flood Control Act does apply to the sale of power generated by the CVP because the standard that it contains, even if applicable, is too vague and general to provide law to apply.

The Flood Control Act's directive to market power in such a way as to "encourage the most widespread use thereof" "could be interpreted in many different ways, such as to require that power be sold to as many different preference entities as possible, thereby fostering the most widespread geographic use of the power, or to mandate sale of the power to those preference entities whose customers present the most diversified mix of agricultural, industrial or residential users, or to require sale of federal power to those preference entities which serve the largest number of ultimate consumers.

Clearly, the "most widespread use" standard is susceptible of widely divergent interpretations. As we said of another law in *Strickland v. Morton, supra,* "[t]he provisions of this statute breathe discretion at every pore." 519 F.2d at 469. The statute permits the exercise of the widest administrative discretion by the Secretary. It

does not supply "law to apply." *See Arizona Power Authority v. Morton, supra,* 549 F.2d at 1252.

In *Panama Canal Co. v. Grace Lines, Inc.,* 1958, 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788, the Court was asked to review the federally chartered Canal Company's decision to require ships passing through the Canal to pay particular tolls. While the applicable statute set out in some detail the criteria to be considered by the Company in prescribing tolls, the Court concluded that the Company's discretion in interpreting the statute was so broad as to bring it within 5 U.S.C. § 701(a)(2) (formerly § 1009) and thus to preclude judicial reviews:

> Where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake of law, then judicial relief is often available . . . But where the duty to act turns on matters of doubtful or highly debatable inference from loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. 356 U.S. at 318, 78 S.Ct. at 757.

We conclude that the Secretary's refusal to allocate non-withdrawable power to Santa Clara is unreviewable because there is "no law to apply." The preference clause contained in the Reclamation Project Act of 1939 does not prevent the Secretary from discriminating against some preference entities to the benefit of others. The Flood Control Act of 1944, while arguably applicable to the sale of power generated by the CVP, is so imprecise that its interpretation requires a "profound exercise of discretion" of the sort described in the *Panama Canal* case. The trial court's finding that the Secretary's marketing decisions as to the terms on which he will market power to preference customers are reviewable is in error. Decisions concerning the proper allocation of CVP power



among preference entities are "action committed to agency discretion by law" within the meaning of the APA and as such are unreviewable.[4]

B. *The Sale of Power to PG&E.*

Santa Clara challenges the Secretary's decision to sell massive quantities of CVP power to PG&E, a privately owned utility. While we have concluded that the preference clause contained in section 9(c) of the Reclamation Project Act of 1939 does not provide law to apply to the Secretary's decision to allocate CVP power among preference customers in one fashion rather than another, the statute clearly does provide a standard against which the propriety of sales to non-preference entities such as PG&E can be measured. *Arizona Power Pooling Ass'n v. Morton, supra.*[5]

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[4] Although the argument was not raised in the trial court, Santa Clara now argues on appeal that inclusion of the Folsom Dam in the CVP network mandates application of a power marketing standard similar to that contained in the Flood Control Act. Section 4 of the American River Act of 1949, 63 Stat. 852, directs the Secretary of the Interior to operate Folsom Dam "in such a manner as will effectuate the fullest and most economic utilization of the land and water resources of the Central Valley project of California for the widest public benefit." This marking standard is as imprecise as that contained in the Flood Control Act and we reject the argument that it provides law to apply to the instant dispute.

[5] As we said in *East Oakland-Fruitvale Planning Council v. Rumsfeld,* 9 Cir., 1972, 471 F.2d 524:

> Agency action is made unreviewable by 5 U.S.C. § 701(a)(2) only "to the extent" that it is committed to agency discretion. . . . An "all or nothing" approach to reviewability would, in specific cases, either be unfair to persons aggrieved by agency action, or impose an unwise burden upon the agency or the courts. Accordingly, separable issues appropriate for judicial determination are to be reviewed, though other aspects of the agency action may be committed to the agency's expertise and discretion.
>
> If a statute or regulation establishes a rule governing the conduct of the agency with respect to an aspect of the agency action, a

PG&E and the federal defendants do not argue otherwise. They concede the applicability of the preference clause but contend that the present marketing scheme does not violate the clause because power is not sold outright to PG&E but is rather "banked" temporarily with the utility pursuant to government contract. The contract provides that all CVP power which is sold to PG&E is subject to the Secretary's right to repurchase at a later date, at the original price plus a "handling charge," plus the difference in cost to PG&E of producing the power sold to the Secretary over PG&E's similar cost at the time it bought.

The Secretary maintains that this arrangement is designed to enable him to supply the growth needs of selected preference customers until 1980. By "banking" power with PG&E during periods when the total output of the CVP exceeds the demands of these selected customers, the Secretary creates an "account" which he can drawn on to satisfy their requirements when demand outstrips supply. It is more accurate to state that the contract requires that an account be kept of all power sold to PG&E and that the Secretary may thereafter purchase power, up to that amount, from PG&E. PG&E sells the power that it buys from the Secretary to its customers at its price. To describe this arrangement as "banking" is to use an inaccurate and somewhat misleading figure of speech.

The relationship between the Secretary and PG&E and the Secretary's preference customers such as Santa Clara is further complicated by two facts. The first is that

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court may determine whether the agency has complied with that rule, although the court still may not review other aspects of the agency action as to which there are no reasonably fixed rules to apply. The presence of a judicially enforceable rule both justifies judicial review, and limits its scope.
471 F.2d at 533-4.



CVP power is fed into PG&E's distribution system and is transmitted by PG&E over its lines to preference customers and to PG&E's own customers. At the same time, power produced by PG&E is also fed into the same distribution system. Once that happens, it is physically impossible, or at least not practicable, to identify any particular unit of power as CVP power or as PG&E power. Thus, in theory, PG&E receives CVP power from CVP and transmits it (or "wheels" it) to Santa Clara over PG&E's lines. In fact, the transmitted power cannot be and is not so identified. The problem is solved by bookkeeping. Track is kept of the amount of CVP power that enters the PG&E system. The Secretary tells PG&E how much of it is for each preference customer. PG&E supplies that amount of power to each. The Secretary then bills each preference customer for that power at the Secretary's price. CVP power received by PG&E and not treated as transmitted to preference customers of the Secretary is treated as sold by the Secretary to PG&E and PG&E pays the Secretary for it. This is the power that is said to be "banked" under the PG&E contract with the Secretary.

The second fact is that there is now being fed into the PG&E system more government produced power than is being produced by CVP power plants. This is because of the creation of the Northwest intertie, whereby substantial amounts of power are being transmitted to the CVP area from the Northwest. The PG&E contract with the Secretary relates to that power as well as to CVP power. It is suggested that the Northwest power never would have been available to preference customers in the CVP area without the cooperation of PG&E embodied in the contract with the Secretary. We assume that this is true, but that fact cannot diminish the Secretary's legal obligation to sell to preference customers. Neither the Secretary nor PG&E argues that the full "Project Dependable Capacity" as defined in the contract, paragraphs 9(a) and (i) and 11, is

not subject to the preference clause. Their only argument is that the "banking" provisions of the contract satisfy the requirements of the preference clause.

The trial court concluded that the "banking" of CVP power with PG&E was not violative of the preference clause. We conclude that the present marketing scheme involves the sale of power to PG&E and that the terms of the preference provisions are not satisfied by the government's repurchase right.

The preference clause states a clear legislative intent and requirement that the Secretary shall favor public entities in the sale of power generated by federal reclamation projects. As we noted recently in *Arizona Power Pooling Ass'n v. Morton, supra,* "[t]he text of the preference provision is couched in mandatory terms, stating that 'preference *shall* be given' (emphasis added) to certain public entities in governmental sales or leases of electric power or power privileges." 527 F.2d at 727. The Secretary is thus given a very specific directive to market federal power to preference customers if any are ready and willing to purchase it. It is only if the available supply exceeds the demands of interested preference customers that the Secretary may offer federal power to private entities. 41 Op.A.G. 236, 1955, *Disposition of Surplus Power Generated At Clark Hill Reservoir Project.*[6]

[6] In advising the Secretary as to the propriety of his proposed scheme for allocating power generated by the Clark Hill Reservoir Project, Attorney General Brownell was called upon to interpret the Flood Control Act of 1944, which contains a preference clause almost identical to that contained in the Reclamation Project Act of 1939. The Attorney General construed the preference provision to require that "when the Secretary of the Interior has before him two competing offers to purchase power, one by a preference customer, and the former does not have at the time the physical means to take and distribute the power, he must contract with the preference customer on condition that such customer will, within a reasonable time to be fixed by the Secretary, obtain the means for taking and delivering the power." *Disposition of Surplus Power Generated At Clark Hill Reservoir Project, supra,* 41 Op.A.G. at 243-44. Thus, in Attorney General Brownell's estimation, even the present inability of a preference customer to take federal power is insufficient to justify a decision by the Secretary to permanently commit the power to a non-preference customer. Here, of course, Santa Clara is able to take its full power requirements from the CVP and has done so in the past.



In this case the Secretary has marketed CVP power to PG&E, a non-preference entity, during times when a preference customer was having its allotment gradually reduced, over its objection. It is claimed that PG&E's allotment was more than adequate to satisfy Santa Clara's full requirements.[7] Nevertheless, the Secretary has, since 1971, progressively reduced Santa Clara's withdrawable allocation.

In defense of the Secretary's arrangement with PG&E, he maintains that he is storing up power with the utility for the future benefit of selected preference customers. In

[7] The following is a comparison of the CVP power sold to Santa Clara as compared to the amount sold to PG&E [in kilowatts]:

| | SANTA CLARA | PG&E |
|---|---|---|
| 1965 | 71,490 | 282,183 |
| 1966 | 78,863 | 198,063 |
| 1967 | 89,367 | 81,377 |
| 1968 | 92,031 | 79,713 |
| 1969 | 106,128 | 55,944 |
| 1970 | 116,471 | 26,406 |
| 1971 | 112,696 | 278,724 |
| 1972 | 89,200 | 382,000 |
| 1973 | 86,550 | 382,000 |
| 1974 | 73,300 | 387,786 |
| 1975 | 73,800 | 337,000 |

The sales to PG&E are in such high quantity that this nonpreference customer has become the Bureau's largest customer.

(Opening Brief of Santa Clara, pp. 44-45). These figures are not disputed by the Secretary or by PG&E.

the meantime, however, to the extent that Santa Clara could have purchased the power, a private utility is profting from the low cost of federal power at the expense of a preference entity. This result, we think, does violence to the plain meaning and intent of the preference provision.

While the stated goal of the banking arrangement is consonant with the preference clause, inasmuch as all CVP power is ultimately committed to meet the needs of public entities, the propriety of the goal cannot save the scheme if its interim effects are violative of the statute. That may be the case here. Congress intended public entities, whenever possible, to benefit from the sale of low cost federal power. An arrangement which enables a nonpreference entity to reap a benefit which Congress sought to bestow upon public entities, even temporarily, flies in the face of that intent.

It is no answer for the Secretary to say that he is merely "banking" power with the utility, rather than selling it outright. A sale is no less a sale because the buyer is obliged, upon the seller's demand, to resell an equivalent amount to the seller. The plain fact is that the power which is conveyed to PG&E does not sit idly in storage, awaiting withdrawal by the government. Instead it is resold by PG&E to its own customers at a substantial mark up. This is a sale, regardless of the verbiage employed to characterize the arrangement.

In *United States v. City and County of San Francisco*, 1940, 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050 the Court considered a challenge to the sale by San Francisco to PG&E of power generated from the Hetch Hetchy project in Yosemite National Park. Section 6 of the Raker Act, 38 Stat. 242, which governed disposition of the power by San Francisco, prohibited the City "from ever selling or letting to any corporation or individual, except a municipality or municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given



to it" by the United States. San Francisco argued that although it conveyed power to PG&E, section 6 was not violated because the power was "consigned" and not sold, to the utility, which acted as "agent" for the City in transmitting and selling the power. The court concluded that San Francisco's contractual relationship with PG&E contravened the legislative intent behind the Raker Act regardless of the words used to describe it:

> Terminology of consignment of power, rather than of transfer by sale, and verbal description of the power Company as the City's agent or consignee, are not sufficient to take the actions of the parties under the contract out of § 6. Congress, in effect trustee of public lands for all the people, has by this Act sought to protect and control the disposition of a section of the public domain. The City has in fact followed a course of conduct which Congress, by § 6, has forbidden. Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law. When we look behind the word description of the arrangement between the City and the power Company to what was actually done, we see that the City has—contrary to the terms of § 6—abdicated its control over the sale and ultimate distribution of Hetch-Hetchy power. 310 U.S. at 28, 60 S.Ct. at 756.

While the preference clause directs the Secretary to extend a preference to public entities in the sale of power generated by federal reclamation projects, that mandate is qualified slightly by the following proviso:

> No contract relating to . . . electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes. 43 U.S.C. § 485h(c).

Thus the Secretary is prohibited from selling CVP power to a preference entity if, in his estimation, to do so would have the effect of cutting back on the power necessary to operate the project's pumping facilities.

Before the trial court, the Secretary sought to justify the sale of power to PG&E on the sole ground that the government's right to repurchase power "banked" with the utility satisfied the preference clause. The issue of the CVP's efficiency for irrigation purposes, and the likely impact of the present marketing scheme, or of Santa Clara's attack upon it, on that efficiency, were not addressed by any of the parties in their moving papers upon which the trial court rendered its decision.

In light of the paucity of information adduced on this key issue, we are loathe to hold the sale of power to PG&E at Santa Clara's expense flatly invalid. It is conceivable that the Secretary's decision to favor PG&E over Santa Clara in the marketing of CVP power could be justified as a measure designed to maximize the project's efficiency for its primary purpose, which is irrigation. Because we think that the Secretary should be given an opportunity to defend the present marketing scheme on this basis, we conclude that we should remand for further fact finding on the limited issue of the sale of power to PG&E and its propriety under the reclamation laws.

PG&E and the Secretary argue that during at least part of the period beginning in 1972, when the Secretary was gradually reducing Santa Clara's allotment, CVP did not have the energy necessary to supply Santa Clara, and Santa Clara was not willing or able to take such intermittent power as was being sold to PG&E. It is also claimed that some of the power sold by the Secretary to PG&E may not have been subject to the preference clause. The trial court did not decide these questions. They can be considered on remand, as can the issue of CVP's efficiency for irrigation purposes if the Secretary chooses to raise it.



C. *Congressional Approval.*

The federal defendants argue that Congress ratified the existing power allocation scheme when it appropriated moneys for the construction of an extra high voltage intertie between the Pacific Northwest and Pacific Southwest. To show ratification, the government must sustain the heavy burden of demonstrating congressional knowledge of the precise course of action alleged to have been acquiesced in. *United States v. Beebe,* 1901, 180 U.S. 343, 354, 21 S.Ct. 371, 45 L.Ed. 563; *United States v. Georgia-Pacific Co.,* 9 Cir., 1970, 421 F.2d 92, 102 n. 28.

We fully agree with the district court's determination that the record in this case "does not support a finding of congressional knowledge of the exclusion of post-1964 preference customers from receiving nonwithdrawable CVP power sufficient to equate passage of the appropriations bills with ratification of the exclusion." *City of Santa Clara v. Kleppe, supra,* 418 F.Supp. at 1256. Similar efforts to infer congressional approval of specific agency actions from the enactment of general appropriations measures proved unsuccessful in *Arizona Power Pooling Ass'n v. Morton, supra,* 527 F.2d at 725-26. *See also, Associated Electric Cooperative Inc. v. Morton,* 1974, 165 U.S.App.D.C. 344, 351-52, 507 F.2d 1167, 1174-75, *cert. denied,* 1975, 423 U.S. 830, 96 S.Ct. 49, 46 L.Ed.2d 47. We think that those decisions are controlling here.

## IV.

### Rule Making and the Administrative Procedure Act

Santa Clara urges, and the district court found, that the procedures followed by the Secretary in arriving at his marketing decisions failed to comport with certain provisions contained in the APA. While we have concluded that the Secretary's scheme for allocating CVP power among preference customers is substantially unreviewable, the adequacy of the procedures utilized in formulating the marketing scheme is a separable issue. *East Oakland-Fruit-*

*vale Planning Council v. Rumsfeld,* 9 Cir., 1972, 471 F.2d 524, 533-35. *See also, Moore-McCormack Lines, Inc. v. United States,* Ct.Cl., 1969, 413 F.2d 568, 581; Saferstein, "Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion,'" 82 Harv.L.Rev. 367, 372 (1968).

The rule making section of the APA, 5 U.S.C. § 553, requires federal agencies to notify the public, conduct hearings, and consider the input of interested parties, before promulgating new substantive rules. However, that section expressly exempts from the rule making requirement all matters "relating to . . . public property." 5 U.S.C. § 553 (a)(2). Power generated by federal reclamation projects is certainly public property; hence the Secretary, in deciding how to allocate CVP output, is not bound to follow the procedures mandated by 5 U.S.C. § 553. *Associated Electric Cooperative, Inc. v. Morton, supra,* 165 U.S. App. D.C. at 354-55, 507 F.2d at 1177-78. *Northern California Power Agency v. Morton,* D.D.C., 1975, 396 F.Supp. 1187, 1191 n. 6, *aff'd* 1976, 176 U.S.App.D.C. 241, 539 F.2d 243.

Santa Clara nonetheless argues, and the trial court held, that 5 U.S.C. § 552, the "Public Information" section of the APA, requires the Secretary to promulgate rules to be followed in arriving at power marketing decisions. In pertinent part, 5 U.S.C. § 552(a)(1) provides that each agency shall publish in the Federal Register:

> (B) statements of the general course and method by which its functions are channeled and determined . . .
>
> (C) rules of procedure . . .
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretation of general applicability formulated and adopted by the agency . . .

As amended in 1966, section 552 also provides that "[e]xcept to the extent that a person has actual and timely notice



of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

On its face, section 552 requires only the publication of existing rules and not the promulgation of new ones. The section requires agencies to make "*available*" procedures by which their functions "*are* channeled and determined," and the substantive rules and general policies which have been "adopted" or "formulated and adopted." This interpretation is bolstered by the existence of an entirely separate section, § 553, headed "rule-making," and by the legislative history of the APA itself. The legislative history suggests that in enacting § 552, Congress was concerned exclusively with the dearth of published descriptions concerning agency structure, function, and procedure.

In 1941, the Senate Judiciary Committee held extensive hearings on the soon to be enacted APA. During those hearings, spokesmen for numerous agencies repeatedly voiced that fear that the publication provisions contained in the proposed law might be construed to require them to develop new rules and regulations. Dean Acheson, Chairman of the Committee appointed by President Roosevelt to make recommendations for improving administrative procedure, addressed these fears in a formal statement to the Senate Judiciary Committee. Of the predecessor provision of section 552, Acheson said:

> . . . [I]n order that persons may know what the policies and interpretations of an agency are, we suggest in section 201(2) that all such policies and interpretations, and the procedures whether formal or informal, and the forms of an agency be made available.
>
> There has been some misunderstanding about the scope of this subsection (2). It is not intended to require agencies to make up policies and interpretations of law, or procedures, out of whole cloth merely for

> the sake of making them. Rather this section is intended to require agencies to make available to the public those policies and procedures which have become crystallized, which through experience have been formulated and adopted. Hearings before a subcommittee of the Senate Judiciary Committee on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess. 829 (1941).

The House and Senate Reports on the APA likewise suggest that Congress, in enacting § 552, sought only to insure that those administrative rules which had "crystallized" would be made available to the public:

> The public information requirements of section 3 are in many ways the most important, far-reaching, and useful provisions of the bill. For the information and protection of the public wherever located, these provisions require agencies to take the mystery out of administrative procedure by stating it. The section has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance.
>
> Senate Committee on the Judiciary, Administrative Procedure Act, S.Rep.No. 752, 79th Cong., 1st Sess. 198 (1945). *See also* House Committee on the Judiciary, Administrative Procedure Act, H.Rep.No. 1980, 79th Cong., 2d Sess. 255 (1946).

Santa Clara cites *Morton v. Ruiz,* 1974, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270, for the proposition that § 552 requires not simply the publication of established rules but also the formulation of new ones. In that case the Bureau of Indian Affairs (BIA) refused to provide general assistance benefits to an Indian couple who had left their reservation to settle in a nearby Indian community. In summarily denying the couple's application for benefits, the BIA cited



a provision contained in its Indian Affairs Manual, an internal operations brochure, which restricted benefits to Indians remaining on the reservation. The Court held that this restriction was based on an impermissible construction of the act which established the assistance program and on this basis the Court held it invalid.

The Court went on to announce in *dicta* that even if the restriction were consonant with congressional intent, section 552 required publication of the eligibility requirements for receiving benefits. The policy of restricting benefits to on-reservation Indians involved in *Morton v. Ruiz* had clearly "crystallized." Indeed, it was enshrined in an internal operations manual. Because the rule had already been formulated by the BIA and was routinely applied by the agency, section 552 required publication.

Here, in contrast, it is not alleged that the Secretary has formulated any rules, substantive or procedural, for the allocation of CVP power. That being so, there is apparently nothing to publish. While some may deplore this state of affairs, the rule making section of the APA, § 553, manifests a clear legislative intent to permit *ad hoc* decision making in the distribution of public property. Senate Committee on the Judiciary, Administrative Procedure Act, S.Rep.No. 752, 79th Cong., 1st Sess. 199 (1945).[8] *Duke City Lumber*

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[8] With regard to the public property exemption to the rule making requirement, the Senate Report on the APA states:

> The exception of propriety matters is included because the principal consideration in most such cases relate to mechanics and interpretations or policy, and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements. None of these exceptions, however, is to be taken as encouraging agencies not to adopt voluntary public rule making procedures where useful to the agency or beneficial to the public. The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rule making procedures they will adopt in a given situation. . . .

S.Rep.No. 752, 79th Cong., 1st Sess., at 199 (1945).

*Co. v. Butz,* D.D.C., 1974, 382 F.Supp. 362, 373, *aff'd,* 176 U.S.App.D.C. 218, 539 F.2d 220, *cert. denied,* 1977, 429 U.S. 1039, 97 S.Ct. 737, 50 L.Ed.2d 751. We cannot read a rule making requirement into § 552, or interpret the section in such a way as to render meaningless the public property exemption contained in § 553.

In *Gonzalez v. Freeman,* 1964, 118 U.S.App.D.C. 180, 334 F.2d 570, and *W. G. Cosby Transfer & Storage Corp. v. Froehlke,* 4 Cir., 1973, 480 F.2d 498, 5 U.S.C. § 552 was interpreted to require agencies to promulgate rules and procedures which had not theretofore been "crystallized." The actual holding in each case was that the agency involved could not terminate a business relationship existing between the agency and the plaintiff without affording a due process type hearing. In each case there is language to the effect that § 552 required the agency to formulate and adopt rules describing the grounds upon which the agency would act and the procedures that it would follow. But in neither case did the court do what the trial court did here, order the agency to formulate and adopt such rules. To the extent that these cases can be said to stand for the proposition that § 552 requires an agency to formulate and adopt rules, we decline to follow them. The trial court's decision in this case, insofar as it requires the Secretary to formulate and adopt rules governing his decisions in marketing power to preference customers, is in error.

## V.

### Due Process

Santa Clara argues that it has a sufficient property interest in CVP power to entitle it to due process protection. The trial court agreed, and further held that the federal defendants had failed to accord Santa Clara that process which was due. The court therefore ordered the federal defendants, *inter alia,* to (1) re-evaluate the



present power allocation scheme with an eye toward possible revision; (2) announce the standards used in devising the allocation scheme then proposed; (3) afford all interested parties an opportunity to comment on the proposed marketing plan; (4) hold a public hearing on the proposed marketing plan; and (5) announce the specific findings relied on in devising the plan ultimately adopted. *City of Santa Clara v. Kleppe, supra,* 418 F. Supp. at 1261-62.

PG&E argues that Santa Clara is not a "person" entitled to due process protection under the Fifth Amendment. PG&E relies primarily on *South Carolina v. Katzenbach,* 1966, 383 U.S. 301, 323-24, 86 S.Ct. 803, 15 L.Ed. 2d 769, where the Court held that a state is not a "person" entitled to due process protection, reasoning that a municipality cannot be a "person" if its progenitor, the state, is not. We are by no means convinced that PG&E's argument is correct. *See Township of River Vale v. Town of Orangetown,* 2 Cir., 1968, 403 F.2d 684, 686, holding that "a municipal corporation like any other corporation is a 'person' within the meaning of the [Constitution]." *See also, Aguayo v. Richardson,* 2 Cir., 1973, 473 F.2d 1090, 1100-01, *cert. denied,* 1974, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101. We need not decide the question. For the purpose of this case, we assume that Santa Clara is a "person."

PG&E and the federal defendants assert that Santa Clara has no protectible "property" interest in CVP power. The trial court based its holding that Santa Clara has such an interest on the City's status as a preference customer under the reclamation laws. In so holding, the trial court was speaking of an interest of Santa Clara vis-a-vis other actual and potential preference customers. The court had already held that sales of CVP power to PG&E under the contract between it and the Secretary did not violate the preference clause. Thus the court had

no occasion to decide whether Santa Clara had a "property" interest vis-a-vis PG&E.

We first consider "property" interest as against other preference entities. While the test for identifying a property interest sufficient to merit invocation of the Due Process clause "is not clearly defined," *Pence v. Kleppe,* 9 Cir., 1976, 529 F.2d 135, 141, the Supreme Court has stated that:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Board of Regents v. Roth,* 1972, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed. 2d 548.

*See also, Geneva Towers Tenants Organization v. Federated Mortgage Investors,* 9 Cir., 1974, 504 F.2d 483 at 489.

The exact perimeters of the "entitlement" concept are as yet unclear. *See* Note, "Statutory Entitlement and the Concept of Property," 86 Yale L.J.No. 4, p. 695 (1977). After reviewing the Supreme Court's recent decisions concerning statutorily created property interests, the author of the note concluded that "a statute will create an entitlement to a governmental benefit either if the statute sets out conditions under which the benefit *must* be granted or if the statute sets out the *only* conditions under which the benefit may be denied." 86 Yale L.J. at 696 (emphasis in original). Under this test, Santa Clara no "entitlement" to CVP power, as against other preferred entities. We think that *Roth* itself is dispositive of this phase of the case. There the Court held that an untenured teacher had no property interest in being rehired because his employment contract gave his employer unbridled discretion to refuse to renew after one year. The



employer did not have to justify its decision not to renew the contract by showing "sufficient cause." Thus Roth had only an "abstract concern in being rehired," rather than a legitimate claim of entitlement. *Roth v. Board of Regents, supra,* 408 U.S. at 578, 92 S.Ct. 2701.

Having completed a year of teaching, Roth, like Santa Clara, could differentiate himself from others who sought the government benefit in question. However, Roth's desire to be rehired, his eligibility for contract renewal, and his special status as a former employee, were all insufficient to clothe him with a "legitimate claim of entitlement." Because the Board of Regents could refuse to rehire Roth for any reason whatsoever, Roth's interest did not rise to the level of an entitlement.

Santa Clara's situation vis-a-vis other preferred entities is comparable. While the City enjoys a statutory preference under the reclamation laws, the Secretary remains free to allocate the total power output of the CVP to other preference users. The Secretary need not justify his decision to discriminate against some preference entities in favor of others and, as we hold today his decision to so discriminate is not judicially reviewable. Given the discretion which the reclamation laws vest in the Secretary in this respect, we cannot accept Santa Clara's contention that it has any "entitlement" to power generated by the CVP as against other preferred entities. The trial court's holding that Santa Clara's status as a preference entity supported a claim of entitlement as against other preferred entities is erroneous. The City has no "property" interest in CVP power as against other preferred entities and consequently no procedural safeguards are constitutionally required in deciding between them.

We next consider "property" interest as against non-preference entities such as PG&E. It is clear that Santa Clara does have such an interest. In essence, our deci-

sion in *Arizona Power Pooling Ass'n v. Morton, supra,* so holds. To similar effect is *Pence v. Kleppe, supra.* There we held that Alaska natives, seeking allotments under the Alaska Native Allotment Act, had sufficient property interests to entitle them to due process. 529 F.2d at 140-42.

What process is due? We have held in part III B, *supra,* that it is a violation of the preference clause for the Secretary to sell CVP power to PG&E to the extent that he is refusing to sell it to an eligible preference entity that has offered to buy it and is ready, willing and able to receive it. There is but one justification possible for a refusal to sell to such a preference entity while selling to a non-preference entity: that, in the judgment of the Secretary, to sell to the preference entity will "impair the efficiency of the project for irrigation purposes," 43 U.S.C. § 485h(c).

It is not disputed that Santa Clara is a preferred entity that has asked for the power. The Secretary and PG&E claim that Santa Clara was not willing or able to receive what the Secretary could sell to it, and that during certain times the Secretary did not have power available to sell to Santa Clara. The Secretary may also claim that selling to Santa Clara would or will impair the efficiency of the project for irrigation purposes. All of these claims can be considered and decided by the trial court. We see no need to remand this case to the Secretary for a due process type hearing.

## VI.

## PG&E's Counterclaim

In 1971, the Secretary began withdrawing power from Santa Clara, gradually cutting back on the City's 1970 allotment of 120,000 kilowatts. Pursuant to a contract between PG&E and Santa Clara, executed in 1969, PG&E is obligated to supply Santa Clara's power requirements



to the extent that they are not met by the Secretary. Taking the position that the Secretary's attempted withdrawals were illegal and therefore ineffective, Santa Clara refused after 1971 to pay PG&E for any of the power purportedly supplied by it. Because, as we have seen, PG&E transmits CVP power over its own lines pursuant to government contract, so that it is not possible to differentiate CVP power from PG&E power except by reference to written records, Santa Clara took the position that the power purportedly furnished by PG&E was actually CVP power coming in over PG&E's transmission lines. Since 1971, the money claimed by PG&E has been paid into an escrow account which as of March 1, 1977, contained nearly $30,000,000.

PG&E and the Secretary both argue that regardless of the result in this case, PG&E is entitled to all of the money in the escrow. As we have seen, the trial court has, as an interim measure, awarded one-fourth of the money in the escrow to PG&E. (note 3, *supra*)

If, as we surmise, the government cannot justify the marketing of power to PG&E while denying it to Santa Clara as a measure designed to safeguard the CVP's efficiency for irrigation purposes, then the past sales to PG&E of so much power as Santa Clara sought and was refused exceeded the Secretary's statutory authority under the reclamation laws. These past sales are void if unlawful, for administrative actions taken in violation of statutory authorization or requirement are of no effect. *Utah Power & Light Co. v. United States,* 1917, 243 U.S. 389, 410, 37 S.Ct. 387, 61 L.Ed. 791; *Federal Crop Insurance Corp. v. Merrill,* 1947, 332 U.S. 380, 384, 68 S.Ct. 1, 92 L.Ed. 10; *Federal Maritime Commission v. Anglo-Canadian Shipping Co.,* 9 Cir., 1964, 335 F.2d 255, 258.

The trial court decided that PG&E's right to the disputed funds hinges on the lawfulness of the Secretary's decision to sell power to PG&E while refusing to allocate

as much power to Santa Clara as that City requested. Consequently, the court concluded, the fate of the escrow account must await action by the district court on remand.

PG&E and the Secretary vigorously attack this ruling. Their position, as stated by counsel for PG&E, is that power cannot be retroactively allocated to Santa Clara because "[a]t all times pertinent to this case all commercially available CVP power was sold to someone. . . . Accordingly, any retroactive reallocation of CVP power would necessarily entail either a whole or partial recission of some or even all of the sales transactions between the United States and its CVP customers from August 1971 to the present." Opening Brief of PG&E at 17. We think, however, that a reallocation of power to Santa Clara, retroactive to 1971 when the withdrawals began, can be accomplished without affecting past sales to other CVP customers. This is so because the Secretary has, over the years, and pursuant to his contract with PG&E, built up a sizeable "bank account" with PG&E. Presumably, that bank account is now available to retroactively satisfy the City's power needs.

Should the district court conclude on remand that the marketing of power to PG&E cannot be justified by reference to the reclamation laws, the government's "bank account" can simply be adjusted downward to reflect past sales to Santa Clara of so much power as the City sought unsuccessfully in the years after 1971. Such a readjustment of the bank account need affect neither past sales of power to other CVP users nor prior trnsactions between PG&E and its customers, aside from Santa Clara.

Without intending to bind the trial court to our suggestions, it seems to us that the consequences would be substantially as follows:

First, PG&E would be entitled to draw from the escrow the full amount (less, of course, what is has already



received) that Santa Clara would have paid to the Secretary for the power that it is "receiving" retroactively. PG&E has paid the Secretary for that power, thereby discharging what should have been Santa Clara's duty. In addition, because it is Santa Clara that withheld the money, PG&E should receive interest at a reasonable rate on the moneys paid to it from the dates when those moneys should have been paid. (See 28 U.S.C. § 1961). The remaining money in the escrow would go to Santa Clara.

Second, the power reallocated to Santa Clara should be treated as drawn from the Secretary's "bank account" with PG&E, thereby diminishing the amount of the power that the Secretary is entitled, under the PG&E contract, to repurchase.

Third, because PG&E will have received for the power sold by it to Santa Clara only the price that Santa Clara would have paid to the Secretary if he had allocated that power to Santa Clara, but that power is being treated as drawn by the Secretary from the "bank account," it would appear that PG&E will have a claim against the Secretary. Presumably, that claim would be for the contract price applicable under the Secretary's contract with PG&E at the times as of which reallocation is made, less the price PG&E will have received from Santa Clara, plus reasonable interest for late payment. (See 28 U.S.C. § 2411(b) and § 2516.)

However, PG&E has counterclaimed only against Santa Clara. It has not filed any claim for relief against the Secretary. We express no opinion as to whether such a claim against the Secretary can be filed or considered by the trial court, see 28 U.S.C. § 1346(a)(2), *Lowell O. West Lumber Sales v. United States*, 9 Cir., 1959, 270 F.2d 12, 19-20, or in the Court of Claims, see 28 U.S.C. § 1491.

We base our assumptions as to interest upon a further assumption that PG&E is an innocent third party, caught between the conflicting claims of Santa Clara and the position of the Secretary.

These suggestions are in line with the ancient and favorite maximum of equity, that equity regards that as done which ought to be done. It is readily applicable here, because all parties to the contracts that are involved, PG&E, the Secretary, and Santa Clara, are before the court, and because what we suggest does not invalidate or violate either contract. The contract between PG&E and the Secretary expressly provides that the Secretary is to supply all of his preferred customers before selling to PG&E. It also expressly provides for the so-called banking arrangement. The contract between PG&E and Santa Clara requires sale by PG&E and purchase by Santa Clara of only that amount of power that exceeds the amount sold by the Secretary to Santa Clara.

The foregoing suggestions are just that; they are not directions because we recognize that the questions giving rise to them have not been fully considered up to now, and all parties should have an opportunity to present their views about them to the trial court. That court is to arrive at its own decision, taking into account, but not being bound by, our suggestions.

## VII.

### Sovereign Immunity

On October 21, 1976, Congress enacted Public Law 94-574, amending 5 U.S.C. § 702, to remove the defense of sovereign immunity in an action seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority. In *Hill v. United States,* 9 Cir., 1978, 571 F.2d 1098 at 1102 (Slip op., page 45 at 49) we held that this amendment is ap-



plicable to a pending action. This statute would have the effect of removing the defense of sovereign immunity, if it were otherwise available in this case. However, it is not necessary to rely on that statute here.

It has long been established that sovereign immunity poses no bar to a suit against a federal officer who is alleged to have acted unconstitutionally or in excess of his statutory authority. *Larson v. Domestic & Foreign Commerce Corp.,* 1949, 337 U.S. 682, 689, 69 S.Ct. 1457, 93 L.Ed. 1628; *Starbuck v. City and County of San Francisco,* 9 Cir., 1977, 556 F.2d 450, 457 n.14; *Washington v. Udall,* 9 Cir., 1969, 417 F.2d 1310, 1314.

PG&E and the federal defendants concede that Santa Clara's various claims fall squarely within these exceptions to the general rule that an action cannot be maintained against the sovereign, absent consent. However, they cite *Larson v. Domestic & Foreign Commerce Corp., supra,* for the proposition that

> . . . a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or disposition of unquestionably sovereign property.
>
> 337 U.S. at 691, n. 11, 69 S.Ct. at 1462.

This court has never interpreted *Larson* as an absolute bar to every action against the sovereign in which affirmative relief or the recovery of government property is sought. *Washington v. Udall, supra,* 417 F.2d at 1317-18. We have construed the case more narrowly to mean "not that a suit *must* fail but only that it *may* fail if the relief sought would work an intolerable burden on the govern-

ment which outweighs any considerations of private harm." *De Lao v. Califano,* 9 Cir., 1977, 560 F.2d 1384 at 1391.

The retroactive power allocation which Santa Clara seeks would not, we think, work an intolerable burden on governmental functioning. As noted above, the relief requested by the City can be granted by simply adjusting the government's bank account with PG&E. Such an adjustment would not affect prior transactions between the government and its other CVP customers. It would merely hasten depletion of the bank account and so would accelerate the date upon which customer demand for CVP power will exceed the available supply. Inasmuch as all of the banked power is ultimately committed to preference users, depletion of the account with PG&E is, in any event, inevitable. We do not think that the government will bear an intolerable burden if it is forced to repurchase banked power at an earlier date than was initially anticipated. Balancing the economic injury which Santa Clara has suffered by virtue of its partial exclusion from the CVP against the minimal inconvenience which the government will experience if the Secretary is forced to alter slightly his long-range marketing plan, we conclude that this action is not barred on grounds of sovereign immunity.

## VIII.

### The National Environmental Policy Act

Santa Clara argued below and reiterates here that the Secretary violated NEPA, 42 U.S.C. § 4321 *et seq.,* by failing to file an environmental impact statement before denying the City's requests for firm power and initiating power withdrawals. NEPA, which requires agencies to file environmental impact statements whenever "major Federal actions" are contemplated, defines those actions as ones "significantly affecting the quality of the human



environment." 42 U.S.C. § 4332(2)(C). The trial court concluded that the Secretary's marketing decisions were not major Federal actions of this kind and because no factual dispute was presented with respect to that key issue, granted the federal defendants' motion for summary judgment.

Seeking to bring the Secretary's allocation decisions within NEPA's definition of major Federal action, Santa Clara alleges that the government's refusal to sell it firm power will (1) force the City to construct its own generating facilities, and (2) cause industries to relocate to communities where electricity is available at lower cost. These effects, the City claims, will have a significant deleterious impact on the environment.

Because the amount of low cost CVP power is finite, demand will likely outstrip supply in the future as it has in the past. Regardless of whether it is Santa Clara or some other preference entity that is forced to look to private sources for the supply of electric power, the environmental consequences will be similar. If the demand for power exceeds the available supply, then new generating facilities must be constructed somewhere, if not in Santa Clara.

Even accepting as true Santa Clara's rather fanciful hypotheses concerning the likely impact of the Secretary's decisions on its small piece of the environment, we think it highly improbable that one allocation scheme will have a more deleterious impact than any other when the total geographic area served by the CVP is considered. As the court stated in *Hanly v. Kleindienst,* 2 Cir., 1972, 471 F.2d 823, 830, *cert. denied,* 1973, 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed.2d 974, an agency must consider "in deciding whether a major federal action will 'significantly' affect the quality of the human environment . . . the absolute quantitative adverse environmental effects of the action itself." No such absolute effects are threat-

ened by the Secretary's decision to allocate CVP power in one way rather than another.

CONCLUSION

The summary judgment against Santa Clara on its claim under the National Environmental Policy Act is affirmed.

The judgment dismissing the action is reversed.

The decision that the Secretary's actions in deciding the terms on which he will sell power to one preference customer as compared to others are reviewable is reversed.

The decision that the Secretary's sale of power to PG&E does not violate the preference clause is vacated. The decision that the Secretary is required to formulate and adopt rules governing the sale of CVP power is reversed. The remand of the action to the Secretary for that purpose is reversed.

In all other respects, the decision of the trial court is affirmed.

The case is remanded to the trial court for further proceedings consistent with parts III B, V, and VI of this opinion.



UNITED STATES DISTRICT COURT, N. D. CALIFORNIA.

CITY OF SANTA CLARA, CALIFORNIA, *Plaintiff*,

v.

Thomas KLEPPE, Individually and as Secretary of the Interior, and Gilbert Stamm, Individually and as Commissioner of the Bureau of Reclamation, United States Department of the Interior, Defendants,

Pacific Gas & Electric Co.,
Intervenor-Defendant.

No. C-75-1574.

July 23, 1976.

DECISION

CONTI, District Judge.

This case brings for judicial resolution a controversy over low cost federal hydroelectric power emanating from the Bureau of Reclamation's California Central Valley Project (CVP). The principal parties are the California City of Santa Clara on one side and the U.S. Department of the Interior and its Bureau of Reclamation on the other. Pacific Gas & Electric, a private utility company, has intervened as party defendant. Simply stated, Santa Clara wants more low cost federal power than the federal defendants have allocated to it, and suggests that the Bureau's allocation scheme is legally defective. The Bureau responds that how it allocates the CVP power under its control is unreviewably discretionary, but, for that matter, the allocation scheme was fairly formulated and is rationally based. PG&E, long an integral part of the Bureau's power allocation plan, and the source to which Santa Clara would most likely have to look for satisfaction of its power needs if the court upholds the Bureau's scheme, supports

the Bureau's position. Santa Clara would prefer to purchase CVP power at $.005 per kilowatt-hour rather than PG&E power at $.019 per kilowatt-hour.[1]

I. *Project Authority and Background.*

CVP is a multipurpose project consisting of numerous dams, hydroelectric power generation and transmission facilities and irrigation canals, located in the Central Valley of California and the surrounding mountains.[2] Although the production of hydro-generated power is not the primary purpose of the Project, the amount of electricity generated is substantial and serves a large number of customers in northern and central California.[3]

The Central Valley Project Authorization Act, 50 Stat. 850, provides in part:

> Sec. 2. . . . The entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow

[1] See Plaintiff's Opposition to Defendants' Motion for Summary Judgment, Doc.No.16, at page 5, n. 1.

[2] The Project is described in fine detail in *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958).

[3] At the time the complaint in this action was filed, the direct customers of the CVP were five municipal corporations in addition to Santa Clara (Roseville, Palo Alto, Redding, Biggs and Gridley); one public utility district (Shasta Dam Area Public Utility District); six federal agencies; five state agencies; one rural electric cooperative (Plumas Sierra Cooperative); and PG&E. The number of ultimate consumer-customers receiving power from these direct customers is in the hundreds of thousands. *See* Defendants' Motion for Summary Judgment. Doc.No. 15, at page 5, n. 2.



> of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further,* That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plans, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, . . . : *And provided further,* That the said dam and reservoirs shall be used first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and third, for power. See also, Central Valley Project Reauthorization Act, 16 U.S.C. § 695d.

Thus incorporated into the Central Valley Project Authorization Act is the following provision of the Reclamation Project Act of 1939, found in Section 9(c), 43 U.S.C. § 485h(c):

> Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power rev-

> enues at least sufficient to cover an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further,* That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 [and any amendments thereof]. . . .
>
> • • • • • •
>
> No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

There is no question, and no argument to the contrary, that the "preference clause" of Section 9(c) applies to sales of federally-generated hydroelectric power from CVP, see *Arizona Power Pooling Assn. v. Morton,* 527 F.2d 721 (9th Cir. 1975), nor does the government dispute that Santa Clara is entitled to preference in the sale of CVP power. Rather, the controversy centers around the Bureau's allocation decision which treats other preference customers more favorably than Santa Clara in the fierce competition for limited low cost federal CVP power.

Santa Clara has received varying amounts of CVP power since 1965. The City had lodged many requests for power with the Bureau, beginning in 1960, but its early requests acknowledged that it could not provide a market for federal power until late 1967, at which time its then existing power requirements contract with PG&E, which had been supplying all the City's power needs, would expire. Wishing to insure a supply of federal power at the earliest opportunity, however, the City sought a prospective allocation to satisfy its future, post-1967, needs.[4] The Bureau responded that it could not then commit itself to such a future allocation, in view of anticipated Project requirements, but that the City's application would be kept on file for consideration nearer the time Santa Clara could actually purchase power, free from the PG&E contract.[5]



Meanwhile, early in 1963 additional hydroelectric power became available to the CVP with the coming on line of power from the Trinity River Division of the CVP.[6] More energy became available as the generating units of that division proceeded to completion in May of 1964. While a notice of this additional power was sent to all entities entitled to preference status, including Santa Clara,[7] requesting estimates of present load requirements and future load growth, this additional power was allocated to then existing preference customers only, excluding Santa Clara, because of the City's inability to take power immediately.[8]

Concerned that all CVP power was fast becoming spoken for, and dissatisfied with the Bureau's repeated assurances that the City's application would receive due consideration, the City, in July, 1964, telegraphed the Secretary of the Interior directly, requesting an immediate allocation of CVP power, on a withdrawable basis if absolutely necessary. The City asserted that its contract with PG&E was not binding on it and should not bar its eligibility to receive CVP power. The Secretary responded that 75 megawatts of power could be offered if the City could make arrangements with PG&E for its transmission. The

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[4] See Plaintiff's Exhibits 2 and 4.

[5] See Defendants' Exhibit 3.

[6] See Plaintiff's Exhibit 3.

[7] See Plaintiff's Exhibit 3.

[8] See Defendants' Motion for Summary Judgment, Doc.No.15, at page 7.

letter warned, however, that the power would be withdrawn when required to meet previously promised, long-term firm allocations to other preference customers.[9] The City thereupon submitted a formal application for that amount, but again requested that it be kept in mind for a firm, non-withdrawable allocation when and if additional power became available, and set forth its predicted power needs through 1980.[10]

PG&E objected to the Department's offering power to Santa Clara while the utility's requirements contract with the City was still outstanding. The Secretary of the Interior concluded, however, that the Department had to recognize its statutory responsibilities in the marketing of federal power to preference customers, including Santa Clara, and that the fact of a dispute between the City and PG&E over the validity of their power requirements contract would not relieve the Department of its statutory duty to provide available service to Santa Clara.[11]

On November 30, 1965, Santa Clara and the Bureau finally contracted for the purchase of CVP power on a withdrawable basis.[12] Santa Clara's allotment under the original contract was 75,000 kilowatts, but was revised upward several times by amendments until it reached a peak of 120,000 kilowatts in November, 1970. All these increases had the City's assent. In 1971, however, the Bureau began to withdraw power from the City, by contract amendments which were not consented to, such that by

[9] See Plaintiff's Exhibit 9.

[10] See Plaintiff's Exhibit 10.

[11] See Plaintiff's Exhibit 12. The Secretary's decision was based in part on advice requested and received from the U.S. Solicitor's office to the effect that the statute unequivocally mandated offering available power to preference customers, and that the Department could not legally be involved in the contract dispute between Santa Clara and PG&E. See Plaintiff's Exhibit 13.

[12] See Defendants' Exhibit 7.



July, 1974, the maximum kilowattage receivable was 71,450. Subsequent withdrawals will most probably take place,[13] and it is alleged that in the not too distant future, the power and associated energy available for purchase by Santa Clara from the federal CVP source will drop to zero. At times when the City's requirements could not be met from federal power sources, Santa Clara has had to purchase the difference from PG&E pursuant to an existing contract.

During the period Santa Clara was receiving withdrawable power it reiterated its request for a non-withdrawable allocation. As additional power became available, however, the Bureau decided to hold most, if not all, of it for preference customers already receiving a non-withdrawable allocation, so as to meet their load growth needs, rather than to offer this power to existing customers with withdrawable allocations, such as Santa Clara, on a non-withdrawable basis.[14]

[13] See Plaintiff's Exhibit 24, which indicates that as of May 1, 1976, there was an anticipated withdrawal from Santa Clara of an additional 24,200 kilowatts.

[14] See Plaintiff's Exhibits 17, 20, 21, and 22, and Defendants' Exhibits 11, 12, and 13.

For example, on March 22, 1966, the Bureau agreed to sell to the Sacramento Municipal Utility District up to 70,000 kilowatts of power in addition to the District's then contract rate of delivery of 290,000 kilowatts. Between the contract execution date and April 1, 1973, the District could receive as much as 70,000 kilowatts in addition to its then allotment by requesting such in writing. After April 1, 1973, the contract rate of delivery to the District was set at 360,000 kilowatts. This new allocation to the District was not subject to withdrawal to meet the demands of other preference customers, as was the allocation of power made to Santa Clara in 1965. See Plaintiff's Exhibit 16, Letter Agreement between Sacramento Municipal Utility District and the Bureau, at par. 4 and 5. A similar contract was entered into in December, 1966, with Westlands Water District. See Plaintiff's Exhibit 23.

Again, on August 22, 1967, the Bureau agreed to sell to the City of Palo Alto, California, an additional 21,000 kilowatts of firm

*Footnote 14 Continued*

power over its then contract rate of delivery of 79,000 kilowatts. Further, the City of Palo Alto was promised its total future load growth requirements through 1980, with the proviso that if total firm load of all preference agencies exceeded the Project output, as preference agency required load increased in subsequent years, a pro rata allocation would be made, based on the ratio of city load to total load. See Art. 7 of Contract between Palo Alto and Bureau, Plaintiff's Exhibit 18. See also original Bureau-Palo Alto Contract, Plaintiff's Exhibit 8. Contrast the language found in Article 7 of the revised Palo Alto-Bureau contract, Plaintiff's Exhibit 18, with the language found in Article 9 of the Santa Clara-Bureau contract, Plaintiff's Exhibit 14. The latter contract states, in pertinent part:

> *Provided*, That power and energy deliveries made under the terms of this agreement are deemed to be power and energy temporarily available from unused allocated firm Central Valley Project power and is also power and energy available within the project dependable capacity for preference agency use. Therefore, power and energy deliveries as contemplated herein will be withdrawn upon 30 days written notice to [Santa Clara], to any extent necessary to limit the total preference agency power demand to an amount within the project dependable capacity of the Central Valley Project. Withdrawal of power and energy up to a total amount equal to the contract rate of delivery specified herein shall constitute termination of this agreement.

The effect of this language vis-à-vis the language found in Bureau contracts with other preference agencies with *non*-withdrawable allocations, such as Palo Alto, is to provide for withdrawals of power from Santa Clara and other customers with withdrawable allocations, when such power is necessary to meet load growths of preference customers with non-withdrawable allocations, within project dependable capacity. Thus, once project dependable capacity is reached due to load growths of these customers, which the Bureau has contracted to satisfy, Santa Clara's allocation will have been completely withdrawn, and its contract with the Bureau will be considered terminated. It is only at this point—when project dependable capacity is reached—that the customers with non-withdrawable allocations will have to suffer a limitation on power to meet load growth, according to the pro rata scheme in their contracts. See Defendants' Exhibit 13. The effect of this difference in contract language is, of course, to treat Santa Clara substantially



*Footnote 14 Continued*

differently from other preference customers in terms of the CVP power it can receive.

Preference customers with contracts providing for a long-term, non-withdrawable allocation of firm power, like Palo Alto's, include the California cities of Biggs, Gridley, Redding, and Roseville, the Plumas-Sierra Rural Electric Cooperative, and the Shasta Dam Public Utilities District, as well as the Sacramento Municipal Utility District and the Westlands Water District noted above.

Preference customers with contracts providing for a short-term, withdrawable allocation of power, like Santa Clara's, include Stanford Linear Accelerator Center, A.E.C. Livermore, A.E.C. Sandia, Beale Air Force Base, DeWitt Hospital, State of California, Grapevine Power Plant, State of California, Mather Air Force Base, Mather Wherry Housing, Mare Island Naval Shipyard, NAS Le-Moore, NAS Moffett, Naval Communications Station Stockton, Naval Radio Station, Dixon, Naval Weapons Station, Concord, Northern California Youth Center, University of California at Davis, and U.S.I.A., Voice of America. As of May 1, 1971, Santa Clara's share of this short term, withdrawable power constituted roughly two-thirds of the total CVP power marketed in this manner. See Defendants' Exhibit 16, particularly the attachment to the Bureau's letter showing anticipated withdrawals from each such customer. Santa Clara is the only major municipality on the list of preference customers with short-term, withdrawable allocations of CVP power. Thus, as far as the record shows, all other municipal users of CVP power fall into the category of preference customers receiving a long-term, non-withdrawable allocation. See also Defendants' Submission of CVP Data, Doc.No.23, which shows kilowatt and kilowatt-hour usage for each CVP customer for 1960-1975. The 1975 consumption figures for *municipal users* are shown in that submission to be as follows:

| Municipal Customer | Kilowatts |
|---|---|
| City of Biggs | 2,440 |
| City of Gridley | 5,967 |
| City of Palo Alto | 139,793 |
| City of Redding | 52,980 |
| City of Roseville | 36,520 |
| City of Santa Clara | 73,800 |
| Sacramento Municipal Utility Dist. | 360,000 |
| Shasta Dam Public Utilities Dist. | 4,186 |
| Plumas-Sierra Rural Elec. Coop. | 10,220 |

Even assuming that Santa Clara's actual utilization of power is presently somewhat in excess of 120,000 kilowatts (the maximum

It is this discrimination against Santa Clara, a preference customer with only a short term, withdrawable allocation, in favor of other similarly situated [15] preference customers, who not only originally received a long-term, non-withdrawable allocation but who also were afforded additional non-withdrawable power as it became available, of which the City primarily complains here. Santa Clara alleges that the Bureau's creation of this class of what the City terms "super-preference customers" contravenes governing legal principles. The defendants do not dispute that such discrimination between preference customers has been practised; [16] rather, it is their position that it is within the unreviewable discretion granted them by Congress to so discriminate. Alternatively, they assert that the discriminatory aspects of the allocation scheme are rationally based.

II. *Specific Legal Claims.*

Santa Clara marshals the following legal arguments in support of its claims:

(1) It contends that the federal government has transgressed the commands of the Federal Reclamation Laws,

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it received from CVP in 1971), the above figures show that the City's power usage is neither significantly greater nor significantly lesser than the usage of other municipal preference customers, who have long-term, non-withdrawable allocations, and the difference in treatment of Santa Clara cannot be attributed to any such factor.

When withdrawals from short-term allocation customers have become necessary, apparently the Bureau has calculated the amount of such withdrawals per customer on some sort of pro rata basis. For example, for the withdrawals anticipated during the summer months of 1971, see Defendants' Exhibit 16, attachment.

[15] "Similarly situated" in the sense of being a municipal user with load demands roughly equivalent to other municipal users of CVP power.

[16] See Defendants' Motion for Summary Judgment, Doc.No.15, at pages 6-9, 10.



43 U.S.C. § 371 et seq. (a) by selling power to PG&E, a private entity not entitled to the statutory preference contained in 43 U.S.C. § 485h(c), and (b) by discriminating against one preference customer, Santa Clara, in favor of other preference customers;

(2) It says that if not the statute, then the Fifth Amendment, with its equal protection concepts of due process, bars such discrimination;

(3) The City claims a denial of the procedural due process protected by the Administrative Procedure Act, 5 U.S.C. § 551 et seq., in the federal defendants' failure to establish, by regulation or otherwise, without opportunity for input by interested parties, any standards or guidelines by which is regulated the method of CVP power allocation among preference customers;

(4) It likewise claims that whatever procedures that might have been followed by the Bureau in determining allocations and types of allocations were so deficient as to deny due process; and, finally,

(5) Santa Clara maintains that defendants' actions violate the National Environmental Policy Act, 42 U.S.C. § 4321 et seq.

The Department and the Bureau, and PG&E, in addition to maintaining that their allocation scheme is unreviewable or in any event rational, respond first, that this is an unconsented suit against the sovereign and is, therefore, barred; second, that Congress has approved the Bureau's allocation scheme; third, that the provisions of the Administrative Procedure Act, 5 U.S.C. § 551 et seq., cited by plaintiff are either inapplicable or were satisfied; fourth, that the City has no property interest entitled to due process protection; and fifth, that NEPA does not apply.

We now have before us (1) federal defendants' motion, joined in by PG&E, for summary judgment on all due

process issues and alleged violations of the Federal Reclamation Laws; (2) defendants' motion for summary judgment on the NEPA claim; (3) plaintiffs motion for summary judgment on the due process issues; and (4) PG&E's motion for summary judgment on its counterclaim against Santa Clara for monies due under its power sale contract. For reasons hereinafter stated, the court denies (1), (3), and (4), and grants (2).

### A. *Sovereign Immunity*

The threshold jurisdictional question raised interestingly enough in the first instance by PG&E and not the sovereign's officers, of whether this suit is barred by the doctrine of soverign immunity, must logically be entertained first. While the law of the subject in some respects is confusing, *Land v. Dollar,* 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947), the inapplicability of the doctrine to this case is relatively clear. Since *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), it has been established that sovereign immunity is no defense in suits against officers who allegedly act unconstitutionally or in excess of authority. *Georgia R. R. & Banking Co. v. Redwine,* 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335 (1952); *Philadelphia Co. v. Stimson,* 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570 (1912); *Ickes v. Fox,* 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937); *United States v. Lee,* 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882). This case presents just such allegations. PG&E's cases, *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Malone v. Bowdoin,* 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962); *Dugan v. Rank,* 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); and *City of Fresno v. California,* 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963), while presenting some fascinating questions regarding the future course of the law of the doctrine as it applies in suits against officers who act *within* valid authority, are not to the contrary. See generally 3 Davis, *Administrative Law Treatise,* §§ 27.03-27.05; and 1970 Supp. § 27.01.



Since we hold that under established law, the doctrine of sovereign immunity does not bar this action, we need not consider the possibility that the Administrative Procedure Act operates as a partial waiver of sovereign immunity, which question is in a state of considerable confusion. Compare *Adams v. Witmer,* 271 F.2d 29 (9th Cir. 1958) (APA authorized suit against officer; sovereign immunity not discussed), with *State of Washington v. Udall,* 417 F.2d 1310 (9th Cir. 1969) (court avoided sovereign immunity by holding that the Secretary exceeded his authority); *Scanwell Laboratories v. Shaffer,* 137 U.S.App.D.C. 371, 424 F.2d 859 (1970) (APA waives sovereign immunity); *Kletschka v. Driver,* 411 F.2d 436 (2d Cir. 1969) (APA waives sovereign immunity concerning those claims which come within its scope).

### B. *Violation of Federal Reclamation Laws.*

#### (1) *Preference Clause Issue.*

Plaintiff notes that substantial amounts of CVP power have been sold to PG&E over the years [17] and maintains that had this power been allocated to preference customers, as the statute requires, there would be no controversy since all of Santa Clara's requirements for power would be met. There is no dispute as to the basic facts: the preference clause clearly applies, and PG&E is not a preference customer.

There is, however, some dispute as to whether this power has actually been unconditionally "sold" to PG&E in the standard sense. If so, the statute has been violated. PG&E and the Bureau maintain that while power *is* sold to PG&E, it is subject to the Bureau's right to repurchase an equivalent amount of energy at a later date for delivery to preference customers.

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[17] See Defendants' Submission of CVP Data, Doc.No.23. Since 1965, PG&E has purchased in excess of 80,000 kilowatts annually; the 1975 allocation to the utility was 337,000 kilowatts.

This is indeed the case. The contract between the Bureau and PG&E [18] provides that capacity and energy sold to PG&E must be recorded in special capacity and energy accounts and is subject to Bureau repurchase rights. See Contract 2948A, Article 20(a, b, c, & e) and Article 21. In essence, energy is "banked" by PG&E for future Bureau use. The bank account provisions of the contract were included to enable the Secretary of the Interior to carry out a power marketing plan developed in 1964 to meet the long-term needs of preference customers.[19] The withdrawals of power from Santa Clara beginning in 1971 were made as a part of this plan.[20] In order for the Bureau to satisfy load growth of the then existing preference customers through 1980 (the time targeted in the 1964 marketing scheme), and at the same time have power available for anticipated Bureau loads coming on line (such as the San Luis pumping unit scheduled for 1966-67), it was necessary to make provision in the scheme for some sort of power banking arrangement, and the Bureau—PG&E contract does just that. Hence, the court finds that the "sales" of power to PG&E do not violate the preference provisions of 43 U.S.C. § 485h(c).[21]

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[18] The PG&E-Bureau contract (Contract 2948A) is attached as Appendix C to Supplemental Memorandum of PG&E in Support of Defendants' Motion for Summary Judgment, Doc.No.27.

[19] The bank accounts and the Secretary's marketing plan are discussed in Defendants' Exhibit 23, "Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and the Pacific Southwest" (Committee Print, 1964) at pp. 21, 35-37, 39, and 43-46. The discussion at pages 35, and 43-46, describes the role of the bank accounts in the power marketing scheme.

[20] See Plaintiff's Exhibit 22, at pages 1-2.

[21] While there is no legitimate preference clause issue in this case, Santa Clara's objection to the sales to PG&E is one aspect of its larger challenge to the marketing scheme in general under which



(2) *Discrimination in Treatment of Preference Customers.*

The relevant provisions of the Central Valley Authorization Act and the Federal Reclamation Laws are set out above. For purposes of this section, the operative provision is that found in 43 U.S.C. § 485h(c) which mandates that in the sales of CVP power, "preference shall be given to municipalities." Santa Clara argues that this language should be read to mean that all preference entities shall be treated equally in the allocation of CVP power.

(a) *Reviewability of Defendants' Actions.*

The defendants and PG&E argue strenuously that the federal statutes governing the sales of CVP power to preference customers represent such a broad grant of discretion in the Secretary of the Interior that his actions thereunder are not subject to judicial review. They rely on the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) which makes that Act, with its provision for judicial review of agency action under Section 702, inapplicable "to the extent that . . . agency action is committed to agency discretion by law."

Judicial reviewability of administrative action is the rule, and nonreviewability an exception which must be demonstrated, and which should result only from a showing of "clear and convincing evidence" of a legislative intent to restrict judicial review. *Barlow v. Collins*, 397 U.S.

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preference entities which were Bureau CVP customers in 1964, when the plan was devised, were promised not only nonwithdrawable present allocations of CVP power, but also allocations for load growth through 1980. The sales to PG&E, and the banking of such power by that company, were for the purpose of reserving power for the existing preference customers' load growth. As such, Santa Clara would claim, these sales are just one more example of discrimination between preference customers, because they are for the purpose of satisfying the power needs of a group of preference customers of which Santa Clara was not allowed to become a part.

159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1969); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Arizona Power Pooling Assn. v. Morton,* 527 F.2d 721 (9th Cir. 1975). See also H.R.Rep.No.1980, 79th Cong., 2d Sess., 41.

As the Supreme Court has stated, the "committed to agency discretion" exception is a very narrow one, applicable only in "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971).

Searching for law to apply, Santa Clara makes alternative contentions. First, the City says that the preference clause itself, mandating as it does that "preference *shall* be given" to municipalities, places limits on the Secretary's discretion sufficient to say that the agency action is not so far commited to agency discretion that judicial review is barred. This argument, like so many in cases seeking to invoke Section 701, ignores the qualifying language found there: "*to the extent* that . . . agency action is committed to agency discretion by law." Looking for shackles on discretion in the abstract is of no aid; rather, there must appear circumscription of discretion on the *particular issue* sought to be challenged. While the Secretary cannot, under the statutory mandate, sell power to a non-preference customer over a preference customer, see *Arizona Power Pooling Assn. v. Morton,* supra, the statutory admonition does not address the question of whether the Secretary can, for example, sell *all* available power to one preference customer while refusing to sell *any* to another preference customer. Since on this particular issue 43 U.S.C. § 485h(c) does not speak, theoretically, judicial review of such a decision, no matter how arbitrary or capricious, is barred under the Administrative Procedure Act.



Looking beyond the confines of the Reclamation Laws, however, San Clara finds in Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, the following:

> Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rate to consumers consistent with sound business principles. . . .

It is admitted by the City that the power generated from CVP is not statutorily controlled by the Flood Control Act. Rather, Santa Clara notes that the Department and the Bureau themselves, and their attorneys here, as a matter of departmental policy consider the provisions of that Act to be applicable to the marketing of CVP power.[22] See

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[22] The Department's position in this regard is found in a letter from then Secretary Udall to Representative Aspinall dated May 15, 1965:

> The provisions relating to power marketing and power rates in section 9(c) of the Reclamation Project Act of 1939 [43 U.S.C. § 485h(c)], section 5 of the Flood Control Act of 1944, and section 6 of the Bonneville Power Act are in pari materia, and each may be examined to shed light on the Congressional intent with respect to the others. Indeed, as a practical matter, as illustrated by the Bonneville Power Administration, because a single system may be used to market power from three different sources, the three statutes have to be read together and interpreted as establishing identical criteria for power rates. Consequently, the mandate of the Flood Control Act of 1944 to market power from Army projects "in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles" applies also to power marketed from reclamation projects under reclamation law.

*Northern Calif. Power Agency v. Morton,* 396 F.Supp. 1187, 1189 (D.D.C. 1975), aff'd per curiam without written opinion," 539 F.2d 243 (D.C.Cir. 1976) (assumed by the court to be the case.)

While the Department's interpretation of the interrelationship between the two Acts is not binding, it is the opinion of the court that at least as far as power marketing is concerned, Congress likely did intend that CVP power was to be disposed of "in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles." The court notes that the subject provisions of the

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See *Federal Reclamation and Related Laws Annotated,* Vol. I, at 649 (1972). See also 41 Op.Atty.Gen. 236 (1955).

PG&E hastens to point out that this statement of Departmental policy, which is in the utility's view "unduly solicitous of Santa Clara's interests", see PG&E's Memo.Add.Pts. & Auth. in Support of Defendants' Motion for Summary Judgment, Doc.No.24, is merely an interpretation of the Reclamation Laws by the Department of the Interior, and, as such, is not binding on the Department or the court. *Wilbur* v. *United States,* 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed. 809 (1930). PG&E attempts to show that Congress would not have wanted this aspect of the Flood Control Act to control the Interior Secretary's power marketing discretion under the Reclamation Laws, by noting that Flood Control Act power rate structures are subject to regulatory jurisdiction of the FPC, whereas Reclamation Act rates are not. Also, PG&E notes, under the Flood Control Act, the FPC is given standards to apply in regulating rates whereas under the Reclamation Laws there is no such regulatory agency to oversee power sales; rather the Secretary of the Interior directly is given such standards and guide-lines. The statutory difference in administration of power rate-setting is without significance on the issue of how power should be marketed in the public interest. The rate structure guidelines in both statutes are designed to insure that the government recoups its investment and covers operating expenses, and in no sense does the presence of the FPC in one scheme give rise to an inference that discretion in formulating power marketing plans is to be greater or lesser in one statute or the other.



Flood Control Act, drafted in language of general applicability to sales of public power, came just after the Reclamation Laws, and thus represent the most recent, but at the same time contemporaneous expression of Congressional desire concerning the marketing of public power. Of greater moment, there is no dearth of Congressional pronouncements that public projects funded by public money should inure to the benefit of the public as a whole to the greatest extent possible.[23] This is clearly the goal of the preference clauses found in a multitude of Congressional acts,[24] including, not insignificantly, that governing power sales from CVP. Public agencies and co-ops were to get first shot at the power generated by federal projects, a concept tracing back to public ownership of water resources and the power flowing therefrom.[25] Finally, as then Secretary Udall stated,[26] as a practical matter, because the Department may often find itself using a single system to market power from many sources, it would seem more convenient to the agency itself to operate under one set of standards, albeit imprecise, in the marketing of public power.

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[23] See, e.g. Cong.Rec.—Senate (Nov. 22, 1944) at 8323.

[24] In addition to the present Reclamation Laws, the Bonneville Power Act, and the Flood Control Act, noted above, preference clauses appeared in the following: Reclamation Act of 1906, 34 Stat. 116, Raker Act of 1913, 38 Stat. 242; Federal Water Power Act of 1920, 41 Stat. 1063, 16 U.S.C. § 800; Salt River Project Act of 1922, 42 Stat. 847, 43 U.S.C. § 598; Boulder Canyon Project Act of 1928, 45 Stat. 1057, 43 U.S.C. § 617d(c); Tennessee Valley Authority Act of 1933, 48 Stat. 58, 16 U.S.C. § 831 et seq.; Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C. § 901 et seq.; Fort Peck Project Act of 1938, 52 Stat. 403, 16 U.S.C. § 833 et seq.

[25] See *Preference to Public Bodies in the Marketing of Public Power,* Library of Congress, Legislative Reference Service, Jan. 20, 1956.

[26] See footnote 22, supra.

For these reasons, the court holds that the standards for power marketing set forth in Section 5 of the Flood Control Act of 1944—that the Secretary must dispose of power "in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles"—were intended to apply to the marketing of CVP power, and since such standards exist, there is law to apply regarding the allocation scheme here challenged. Thus, the court is not barred from judicially reviewing the allocation scheme by the provisions of 5 U.S.C. § 701(a)(2).

(b) *Congressional Approval of Power Marketing Scheme.*

Defendants' next line of defense which, if established, would bar judicial review of the Secretary's exercise of discretion, is that the specific marketing program at issue here, including its discriminatory impact on Santa Clara and others received Congressional imprimatur by virtue of the enactment of various appropriations bills implementing construction of the Pacific power intertie.[27]

The Department of the Interior in mid-1964 submitted to the House and Senate Appropriations Committees a report [28] regarding negotiations with non-federal entities for construction of extra-high-voltage intertie lines linking the Pacific Northwest and the Pacific Southwest. The focus of the Report was upon the advisability of including non-

[27] See Section 8 of the Pacific Northwest Power Marketing Act, Public Law 88-552, 16 U.S.C. § 837g and Public Works Appropriation Act, 1965, 78 Stat. 682, regarding the construction of the intertie facility.

[28] The 53-page report, in evidence as Defendants' Exhibit 23, is entitled "Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and the Pacific Southwest" (Committee Print, 1964).



federal entities in the intertie construction program, the various proposals received from the twelve utilities for intertie construction and the criteria used by the Department in evaluating them, the benefits to the United States and to preference customers associated with each proposal, and Departmental recommendations for Committee action. After receiving the original Report, California congressmen requested the Department to consider in addition three issues, one of which was the possibility of providing "for increases in Federal service to CVP preference agencies to provide for their load growth." [29] This request resulted in an amendment to the proposal to increase the CVP bank account.[30]

Defendants maintain that the Report as amended contained provision for limiting sales of non-withdrawable CVP power to those preference agencies then (i. e., in 1964) receiving project power, to the exclusion of preference entities that might request power in the future; that this provision was specifically approved by the Appropriations Committees; and that in enacting appropriations bills recommended by the Committees, Congress in effect ratified the allocation scheme limiting sales of non-withdrawable power to the 1964 customers.

The court cannot agree. There are weak links in the argument, beginning with the Report and its amendment. The language is at best ambiguous on the specific issue of whether future preference customers could be included in CVP. The amendment, the only operative provision of

[29] See Amendatory Letter of July 17, 1964, to the Report, at pages 43-44. In addition the Department was requested to look into assuring Canadian treaty power for California water projects and providing for post-amortization benefits to the federal government and periodic review of certain subtransmission charges.

[30] See Report at 45.

which was to raise the ceiling on the CVP bank account by a certain estimated amount, states in pertinent part:

> The request of the California Congressmen that the intertie plan be amended to provide load growth for CVP preference customers required that we first establish a reasonable target date. We selected 1980. If load growth could be assured for CVP municipal and cooperative customers until 1980, they would have ample time to make alternative arrangements for additional power supply when they can no longer get all their power from the Central Valley Federal System . . .
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> Having selected 1980 as the target date, the Bureau of Reclamation in cooperation with its CVP customers estimated the amount by which the ceiling on the CVP bank account must be raised to meet interim load growth, and the amount of additional transmission capacity between CVP and the Northwest required to maintain the bank account at this higher level for a 40-year period. The Bureau determined that with anticipated diversity of peak loads between its customers, a system capability of 1,050 megawatts would enable it to serve projected customer loads of 1,080 megawatts in 1980. The 1,080 megawatts is related to load growth of only non-Federal customers now served by the Bureau of Reclamation, excluding SMUD and State agencies. To the extent additional public agencies or co-ops become CVP customers, the Bureau's ability to meet load growth of existing customers might be diminished.
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> . . . .
>
> The amended proposal permits carrying preference-customer loads, as indicated earlier, to a total of 1,050 megawatts.

The report abounds with references to "preference customers" as a group, and the benefits and cost savings they



would receive under the intertie proposal, with absolutely no specific reference to limiting the group to those entities receiving Bureau power in 1964.[31] Then existing agency loads and anticipated needs were used to estimate the amount by which the CVP bank account would need to be increased, and this increase in itself was the vehicle used to provide for load growth, but at no point does the above quoted language unequivocally state that only *those* customers' load growths are to be protected. It is arguable, in fact, that the language can be read to imply that it *was* anticipated that future preference customers would come on the power lines, and that, while an effort was made to protect load growths of existing customers, such protection would not be guaranteed.[32]

It cannot be said with sufficient certainty that members of the Committees, if asked, would have agreed that their recommendation of the intertie construction as outlined in the Report amounted to a decision that only the Bureau's 1964 customers would be entitled to non-withdrawable CVP power.

This is not, however, the weakest link in the chain. There is no indication in the record, and defendants have

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[31] See, e.g., Report at 21-22, 34-37, 39.

[32] The amendment states: "To the extent additional public agencies or co-ops *become* CVP customers . . . ." (Emphasis added). Such an interpretation of the Report language would be more consistent with the rest of the Report and with the preference clause of 43 U.S.C. § 485h(c) which says "preference shall be given to municipalities". Reading the Report amendment in the manner proposed by the Bureau and PG&E would border on finding that Congress impliedly repealed 43 U.S.C. § 485h(c) as to sales of CVP power after 1964, merely by passing the appropriations bills. "Repeals by implication are not favored . . . . The intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939). Such intention, if it existed here, is anything but "clear and manifest".

certainly not established, that the Committees, having approved the proposals, did anything more than simply recommend to the Congress as a whole that an appropriation to initiate construction of transmission lines be made, "as recommended in the report of the Secretary of the Interior as amended." See S.Rept.No.1326, 88th Cong., 2d Sess. 37-38 (1964) and H.R.Rept.No.1794, 88th Cong., 2d Sess. 42 (1964). Knowledge of the precise course of action alleged to have been acquiesced in is an essential prerequisite to a finding of ratification, cf. *United States v. Beebe,* 180 U.S. 343, 21 S.Ct. 371, 45 L.Ed. 563 (1901); *United States v. Georgia-Pacific Co.,* 421 F.2d 92 (9th Cir. 1970), and the record before the court does not support a finding of congressional knowledge of the exclusion of post-1964 preference customers from receiving non-withdrawable CVP power sufficient to equate passage of the appropriations bills with ratification of the exclusion.[33] See also *Arizona Power Pooling Assn. v. Morton,* supra; *Associated Electric Coop. Inc. v. Morton,* 165 U.S.App. D.C. 344, 507 F.2d 1167 (1974).

Having determined that there are no legal obstacles to review of the Secretary's actions with respect to Santa Clara, and that there is some, albeit imprecise, law to apply in the course of that review, the question remaining is whether those actions were and are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The precise question is whether the Secretary has acted consistently with his mandate to dispose of CVP power "in such manner as to encourage the most widespread use thereof at the lowest

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[33] Moreover, the rules of each House of Congress expressly provide that appropriation bills are not to include general legislation. Rule XVI, para. 2, 4, Standing Rules of the Senate, Rules and Manual, United States Senate, 84th Cong. (1955); Rule XXI, par. 2, Rules of the House of Representatives, Rules and Manual, House of Representatives, 84th Cong. (1955).



possible rates to consumers consistent with sound business principles." If it is Santa Clara's position that this directive precludes any sort of discrimination among preference customers, it is, of course, not well taken. Nor can Santa Clara legitimately claim an automatic entitlement" to CVP power simply by virtue of its status as preference customer. *Arizona Power Pooling Assn. v. Morton,* 527 F.2d 721, 730 (9th Cir. 1975). The most that Santa Clara can claim is a reasonable "opportunity to compete" on equal terms with other preference customers for CVP power. *Id.* Rather, the City's argument must be that the Secretary's refusal to offer it CVP power on a non-withdrawable basis is an arbitrary exercise of the substantial discretion inherent in determining what allocations and types of allocations (1) "would encourage the most widespread use" of CVP power, (2) would provide "the lowest possible rates to consumers", and (3) would be "consistent with sound business principles".

The Bureau's stated justification for excluding Santa Clara from a non-withdrawable allocation of CVP power is inadequate. That justification goes no further than merely to assert that only those Bureau customers who were such in 1964 are entitled to non-withdrawable allocations, and those who applied thereafter are not.[34] As the

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[34] It appears that even the stated justification may not have been strictly adhered to by the Bureau. As Santa Clara has repeatedly and heatedly pointed out, there are at least two instances in which the Bureau has provided non-withdrawable allocations for preference entities who were not customers in 1964.

As an example, Santa Clara alleges that the City of Biggs received an allocation of long-term, non-withdrawable power a month after Santa Clara's July, 1974 request for an immediate allocation of power, which was granted on a withdrawable basis only. See Plaintiff's Exhibit 10. There is no specific proof in the record regarding the Bureau's treatment of Biggs, except for the fact that Biggs first received CVP power sometime in 1967. See De-

court has previously held, it does not sufficiently appear to have been the intent of Congress to set the 1964 cut-off date, so as to allow the Bureau's allocation scheme to stand on that ground alone.

The court is not prepared at this time, however, to judge whether or not the allocation scheme as a whole, or Santa Clara's treatment thereunder, is arbitrary or irrational or not in compliance with the marketing standards set forth above. Such a decision can be made much more intelligently, if judicial resolution is then necessary, after the Department on remand has had the opportunity to formulate standards and guidelines for the allocation of CVP power, after hearing from interested parties (as required by the court's holding in Part II.D., infra) according to published procedures (as required by the court's holding in Part II.C.(2), infra). Once this is accomplished a detailed record will exist containing all relevant empirical data and facts, competing technical arguments, reasoned analyses of each scheme suggested and, most importantly, specific reasons

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fendants' Submission of CVP Data, Doc.No. 23 (# 294). The Bureau seems to concede the point, for it argues that the allocation to Biggs is justifiable on the grounds of the small size of the allocation (a maximum of 2,440 kilowatts in 1975). The court expresses no viewpoint on the legitimacy or rationality of this justification.

As a further example, the City points to Westlands Water District, which received a long-term allocation of CVP power on December 1, 1966, by contract with the Bureau (in evidence as Plaintiff's Exhibit 23). The contract provided for an immediate contract rate of delivery of only 250 kilowatts, but with provision for the District to take up to 50,000 kilowatts on request, and with further provision for the contract rate of delivery to be set at 50,000 kilowatts as of 1977. The Bureau has extended the reservation date from 1977 to 1980. See Contract Amendment 1, page 2, Plaintiff's Exhibit 23. See also Defendants' Submission of CVP data, Doc.No.23 (# 290) establishing that Westlands first received CVP power in 1966 (117 kilowatts). The defendants have offered no justification for the treatment of Westlands. The court expresses no viewpoint on the rationality of this treatment.



supporting the eventual choice of one allocation scheme over all others. This procedure allows, in fact insures, that the special expertise of the agency concerned and of other interested groups will be fully brought to bear on this problem of great technical complexity. Only on viewing such a record could the court make a reasoned decision as to whether the plan adopted complies with the law.

The court wishes to stress that no finding is made here as to the legal validity or invalidity of the Bureau's existing scheme for the allocation of CVP power. It is entirely possible that the present scheme fully comports with the statutory mandate, insofar as its effects are concerned. The only finding at this point is that the procedures employed in formulating the allocation plan and the reasons given in support thereof are legally inadequate. See Parts II.C.(2) and II.(D.) infra.

Similarly, the court also declines to consider whether Santa Clara's Fifth Amendment equal protection rights have been violated. The legal test which would be used in such an analysis—whether a rational basis exists for the classification in which Santa Clara finds itself—would require the same sort of inquiry as that needed to decide whether the present allocation plan satisfies the statutory power marketing standards. It would be necessary to investigate whether the means chosen (the particular treatment given some preference customers in favor of others) substantially further the legislative goal (the disposition of CVP power in accordance with the standards set forth in the Flood Control Act). Again, such an investigation best awaits the making of a detailed record containing a well-articulated basis for the final allocation scheme chosen, which can then, if a dispute arises, be measured against the demands of equal protection.

### C. *Violation of Administrative Procedure Act, 5 U.S.C. § 551 et seq.*

Santa Clara maintains that the Administrative Procedure Act requires defendants to promulgate rules or regulations, according to established procedures, governing decision making in the realm of dispositions of CVP power. Defendants concede that no such rules have been published or regulations promulgated, but contend that the APA places no such requirements on them to do so.

(1) *Rule making—Section 553.*

If Santa Clara is relying on this provision of the APA, as it seems, then that reliance is misplaced. This section does govern administrative rule making, providing for published notice of hearing inviting interested parties to submit their views, and for agency decision after consideration of such input, but it expressly excepts from its operation matters relating to public property, 5 U.S.C. § 553 (a)(2), into which category falls federal hydroelectric power. See, e.g., *Assoc. Elec. Coop. Inc. v. Morton,* 165 U.S. App.D.C. 344, 507 F.2d 1167, 1177-78 (1974); *Northern California Power Agency v. Morton,* 396 F.Supp. 1187, 1191 n. 6 (D.D.C. 1975), aff'd per curiam without written opinion, 539 F.2d 243, No. 75-1572 (D.C. Cir., 1976).

(2) *Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings—Section 552.*

The APA, 5 U.S.C. § 552(a)(1) requires "each agency" to publish in the *Federal Register* for the guidance of the public:

> (B) statements of the general course and method by which its functions are channeled and determined . . .
>
> [and]
>
> (C) rules of procedure . . .



The Bureau did not publish any such description of the procedures followed in making power allocations to preference customers at any point in time, either initially, or as capacity was added to the Project. The statute clearly provides that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby. 5 U.S.C. § 552(a)(1). *W. G. Cosby Transfer & Storage Co. v. Froehlke,* 480 F.2d 498 (4th Cir. 1973); *Northern California Power Agency v. Morton, supra,* 396 F.Supp. at 1191. The federal defendants seek, however, to invoke the statutory exception which applies when "actual and timely notice" of the terms of the procedures to be followed are given.[35] See *Kessler v. FCC,* 117 U.S.App.D.C. 130, 326 F.2d 673 (1963). The few CVP customers, says the Bureau, are best kept informed of Bureau procedures and anticipated actions through the frequent contacts the Bureau has with each customer, rather than through the medium of the *Federal Register.*

This may well be so, but the issue is not whether the Bureau had the opportunity to inform interested parties of procedures to be followed in setting CVP power allocations; rather, the issue is whether the Bureau availed itself of this opportunity. From all that appears on the record, the allocations were made by the Bureau on an *ad hoc* basis more or less unilaterally, without specific opportunity for interested parties to express their views. While Santa Clara was notified at various times when additional CVP power became available,[36] and was informed that an allocation process would be adopted if applications exceeded avail-

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[35] 5 U.S.C. § 552(a)(1) states, in pertinent part:
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

[36] See Plaintiff's Exhibits 1-7.

able power,[37] no procedures were specified by the Bureau for receiving input regarding how allocations would be made. Santa Clara was merely repeatedly told that its application for an allocation of nonwithdrawable power would receive due consideration.[38] In February of 1972, Santa Clara was finally told that the method of allocation was broadly discretionary, that the law does not require all preference customers to be treated on the same basis, and that Santa Clara was at least more fortunate than applicants who had received no power at all.[39] The court holds that it was incumbent on the Bureau reasonably to inform those to be affected by power allocation decisions of the procedures employed in making those decisions. In a case involving the procedures for setting a rate-hike for CVP power, it was said:

> Where "timely" notice of "rules of procedure" is required, the statute cannot be satisfied by actual notice of the Department's improvised decisions as each new problem arises. What is contemplated is a reasonably complete code of procedures set out in advance by which actions can be guided, and strategies planned. This simply was not provided.

*Northern California Power Agency v. Morton,* supra, 396 F.Supp. at 1191. The statutory exemption cannot apply where, as here, such procedures as were followed were incompletely and imprecisely delineated and communicated haphazardly, if at all, to affected parties. As a result of the court's holding here, and in Part II.D. infra, it will be necessary for the Bureau to publish, or disseminate so as

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[37] See attachment to Plaintiff's Exhibit 3, entitled "Power Marketing Criteria", Bureau of Reclamation, January 2, 1962, at par. V.

[38] Plaintiff's Exhibits 9, 11, and 21.

[39] Plaintiff's Exhibit 22.



to provide actual notice to all interested parties, specific rules of procedure to be followed regarding proceedings to determine the types and amounts of allocations of CVP power among preference customers. See *Gonzalez v. Freeman,* 118 U.S.App.D.C. 180, 334 F.2d 570, 578-80 (1964) (Burger, J.); see also *W. G. Cosby Transfer & Storage Corp. v. Froehlke,* 480 F.2d 498, 503 (4th Cir. 1973).

D. *Denial of Due Process.*

The absence of standards or guidelines for allocating CVP power among preference customers and the lack of opportunity for interested parties to participate in the process by which the allocation decisions are made, spell out, in Santa Clara's view, a denial of procedural due process.

(1) *Interest Entitled to Protection?*

To reach these claims, it must be shown that an invasion of some legally protected right has occurred. *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951); *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). At this late date, it cannot be said that a "right" exists to do business with the government. *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940). What kind of "property right", if any, does the governing federal statute [40] confer? See *Bishop v. Wood,* —— U.S. ——, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Board of Regents v. Roth,*

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[40] The federal reclamation laws provide the "property right", if such exists. We do not look to the contract entered into by Santa Clara with the Bureau, which admittedly limits Santa Clara's rights to *withdrawable* power, because the issue here is the validity of the procedures used by the Bureau to determine that Santa Clara was to have a contract for withdrawable power only. And it cannot realistically be said that by entering into the contract, which was all the City could get, it waived its right to such procedural due process as the reclamation laws might afford.

supra, 408 U.S. at 577, 92 S.Ct. 2701. That Santa Clara is a municipality statutorily entitled to "preference" in the sale of CVP power is unavailing, say the defendants; preference customers have no "automatic entitlement" to CVP power. *Arizona Power Pooling Assn. v. Morton,* 527 F.2d 721, 730 (9th Cir. 1975). But lacking "automatic entitlement" is not equivalent to lacking any "right" whatsoever in the subject property, federal power. Certainly Congress did not grant to Santa Clara a present ownership interest in CVP power. But this recognition cannot end our inquiry, for property interests protected by procedural due process extend "well beyond" actual ownership of a commodity. *Board of Regents v. Roth, supra,* 408 U.S. at 571-72, 92 S.Ct. 2701.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
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> . . . . . .
>
> [Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source. . . . —rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

*Id.* at 577, 92 S.Ct. at 2709. Were Santa Clara before us as just another potential customer of Bureau power, unclothed of any Congressional recognition of special privilege in the fight for power, we would have to conclude that the City's interest did indeed go no further than an "abstract need or desire" or "unilateral expectation". But the fact that Congress has seen fit to distinguish municipalities from non-public potential customers of CVP power lends a certain legitimacy to Santa Clara's claim of entitlement.[41]

[41] See also *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926).



Granted, the "dimensions" of this property interest are statutorily restricted to "preferential" consideration therefor; nevertheless, a restriction on a property right does not eviscerate its status as a right. The preferential treatment Congress has afforded public entities clearly raises the probability that such a customer will receive power over and above that of other customers. The long history of the various laws directing the disposition of public power first to the public, attests to the existence of some claim of entitlement for public agencies.[42] Accordingly, the court holds that a sufficient statutory property interest exists to call forth some degree of due process protection.[43]

(2) *What Process is Due?*

"[T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Goss v. Lopez,* 419 U.S. 565, 577-78, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975). What procedures are required must reflect a careful balance between, on one scale, the nature of the right affected and the consequences to the right-holder of its loss, and on the other, the administrative burden imposed on the agency. *Pence v.*

[42] See notes 24 and 25 and accompanying text. See also House Report on H.R.7642, 75th Cong., 1st Sess., Rep. No. 1090, at 2-3.

[43] In *Northern California Power Agency v. Morton,* 396 F.Supp. 1187 (D.D.C.1975), aff'd per curiam without written opinion, 539 F.2d 243, No. 75-1572 (D.C.Cir., 1976), while the Bureau there *conceded* that CVP preference customs have a statutory interest entitled to some degree of due process protection—and thus the issue was not specifically decided—the court did not question the validity of the concession, and in fact supplied its own citation therefor, *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970) (statutory interest in welfare benefits sufficient to invoke due process protection); *Thompson v. Washington,* 162 U.S. App.D.C. 39, 497 F.2d 626 (1973) (statutory interest in *low-rent* housing sufficient to invoke due process protection against rental increase).

*Kleppe,* 529 F.2d 135, 142 (9th Cir. 1976), citing *Goldberg v. Kelly,* supra. The objective is to ensure that the agency will acquire the information it should have in a manner fairly calculated to illuminate the issues for reasoned decision making. *Northern California Power Agency v. Morton,* supra, 396 F.Supp. at 1192-93.

Procedural due process has a function beyond that of encouraging enlightened, informed administrative decisions. Courts have with increasing frequency recognized that due process means that adminstrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles and rules.

> Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. Rules and regulations should be freely formulated by administrators, and revised when necessary. Discretionary decisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.

*Environmental Defense Fund, Inc. v. Ruckelshaus,* 142 U.S.Ap.D.C. 74, 439 F.2d 584, 598 (1971) (Bazelon, C. J.).[44] It is all the more imperative that courts require ad-

[44] See also *Silva v. Secretary of Labor,* 518 F.2d 301, 311 (1st Cir. 1975); *United States v. Barbera,* 514 F.2d 294, 302-04 (2d Cir. 1975); *Morales v. Schmidt,* 489 F.2d 1335, 1348-49 (7th Cir. 1973) (Stevens, J., dissenting), rehearing en banc, 494 F.2d 85, 87-88 (7th Cir. 1974); *Mobil Oil Corp. v. FPC,* 157 U.S.App.D.C. 235, 483 F.2d 1238 (1973); *United States v. Bryant,* 142 U.S.App.D.C. 132, 439 F.2d 642, 652, n. 22 (1971); *Soglin v. Kauffman,* 418 F.2d 163, 168 (7th Cir. 1968); *Holmes v. New York City Housing Auth.,* 398 F.2d 262, 265 (2d Cir. 1968); *Gonzalez v. Freeman,* 118 U.S. App.D.C. 180, 334 F.2d 570, 578 (1964); *Hornsby v. Allen,* 326 F.2d 605, 609-10 (5th Cir. 1964); *Northern California Power Agency v. Morton,* 396 F.Supp. 1187, 1194 (D.V.C.1975); *Harnett v. Board of Zoning, Subdivision and Building Appeals,* 350 F.Supp. 1159, 1161 (D.C.I.1972); *Smith v. Ladner,* 288 F.Supp. 66, 70-71 (S.D.Miss.1968).

Professor Davis is in full accord with this approach, and in fact, is probably its source. See Davis, *Administrative Law Treatise,* 1976 Supp., Sections 2.00 through 2.00-6,6.13, and 1970 Supp., same sections. See also Leventhal, "Principled Fairness and Regulatory Urgency", 25 Case W.R.Law Rev. 66, 70 (1974).

[45] Since it has been the Department's position that these standards from the Flood Control Act govern its sales of CVP power, see note 22 and accompanying text, supra, if we assume that the Department has exercised its discretion consistently with its stated position, it might even be said to be *likely* that the present scheme reaches the "correct result" as far as the statute is concerned. We hold only that the procedures used to arrive at that "result" were defective as measured against the demands of due process.



ministrators to articulate the standards that guide their discretion where, in cases such as the one at bar, the court lacks the scientific expertise that would permit meaningful review. If administrators themselves will "provide a framework for principled decision-making", a court can properly confine itself to review of the framework, where it has competence, rather than the merits of the decision, where it is often scientifically unequipped to cope. This is such a case, and such requirements must be imposed here.

Since the Bureau's present CVP power allocation scheme might well fully comply with the statutory mandate "to dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles",[45] and to sell such power only if to do

so would not "impair the efficiency of the project for irrigation purposes" (43 U.S.C. § 485h(c)), procedural due process in this context should not and does not demand that the existing scheme be scrapped immediately and an entirely new scheme be developed. That scheme may be used as a starting point in a sequence of steps that must be taken by the Department and the Bureau to assure that due process is satisfied. These steps are as follows: (1) After re-evaluation of the present scheme in light of the legal conclusions herein expressed, the Department and the Bureau should (a) arrive at a decision, to be considered at that point tentative, as to what the allocation scheme should be (it may in fact be the present scheme if, after due consideration, the Bureau believes it to comply with the statute), and (b) state, in detail sufficient to permit those affected to make a meaningful response, the standards and guidelines used to guide discretion in setting the types and amounts of allocations of CVP power among preference customers, to include (i) the underlying facts, empirical data, and assumptions relied upon, and (ii) detailed rationale for the scheme tentatively chosen, all with an eye toward explaining to all concerned precisely how the chosen scheme fulfills the statutory commands; (2) publish these standards, guidelines, and reasoning, or otherwise give actual notice thereof to all concerned; (3) afford reasonable opportunity for all interested parties to submit written comments on the scheme tentatively chosen; (4) hold a public hearing during which parties may supplement their written comments with on-the-record questioning of Department and Bureau experts and others whose facts, data, or conclusions influenced the choice of the tentative scheme; and (5) after consideration of all input from interested parties, make a final determination of the allocation scheme to be employed, setting forth specific findings with respect to the various comments received and the reasoning which led to the final conclusion. For purposes of later judicial review, if necessary, an identifiable record must be created. Any regulations needed to implement the above requirements should be promulgated. See 43 U.S.C. § 1201.



(3) *Relief.*

The court believes it would operate against the public interest to strike down the entire allocation scheme under which CVP power is now distributed to preference customers, and, in the exercise of its equitable discretion in fashioning the appropriate relief, declines to do so. Rather, the existing scheme is to remain in full force and effect pending the outcome of the agency's formulation of standards and guidelines for allocation of CVP power and re-evaluation of its present scheme in light of the legal conclusions here expressed and after opportunity for party input as directed above. This procedure allows the agency the chance in the first instance to remedy the due process defects which exist. See Leventhal, "Environmental Decisionmaking and the Role of the Courts", 122 U.Pa.L. Rev. 509, 539 (1974). The consequence of this holding is, of course, that the court declines to decline illegal the withdrawals of power from Santa Clara beginning in 1971, as the City requests, or to order the Bureau to grant Santa Clara a long-term, non-withdrawable allocation of CVP power. As the court has noted, it might be that the Bureau's existing scheme complies in fact with the applicable CVP power distribution standards, notwithstanding that it was devised in the absence of required procedural safeguards, and for the court to upset the status quo at this time would constitute at best a premature, and at worst an unjustified, interruption of CVP power distribution, affecting thousands of consumers.

(4) *PG&E's Counterclaim.*

This disposition requires that PG&E's motion for summary judgment on its counterclaim against Santa Clara be denied. PG&E's claim against the City arises out of a

contract executed in March, 1969, whereunder PG&E would supply the City's excess power requirements at wholesale rate at such times as Santa Clara's share of CVP power, as set by the Bureau, did not meet the City's total requirements.[46] As the Bureau began withdrawing power from Santa Clara in mid-1971, the share of the City's total requirements which had to be supplied by PG&E increased, and the utility billed the City for the difference.[47] Rather than remitting the amounts due, Santa Clara deposited them in escrow every month upon receiving PG&E's bill, pursuant to an arrangement with the utility undertaken so as to preserve any rights the City might have against the federal government.[48] It was the City's position throughout, of course, that the Bureau's stated power withdrawals were illegal and therefore without effect, that the power received by the City to meet its total requirements was thus, in fact, CVP power, coming in over PG&E transmission lines, and that the money in the escrow fund was not owing to PG&E but rather to the federal government,[49] since it was federal power Santa Clara had been purchasing the whole time.

Given the court's holding, the funds will have to remain in escrow until such time as the Bureau determines, under

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[46] See Exhibit I to PG&E's Motion for Summary Judgment, Doc. No.49.

[47] See Attachment to Santa Clara's Motion for Summary Judgment on the Due Process Issues, Doc.No.39.

[48] See Exhibit II to PG&E's Motion for Summary Judgment, Doc.No.49.

[49] In actuality, according to Santa Clara's argument, only part of the escrow fund would be owing to the Bureau, since amounts deposited were at PG&E's rates for power, whereas CVP power was substantially less expensive. Were Santa Clara to prevail in its argument that the Bureau's withdrawals were illegal, the City would receive the amount left in the fund after paying off the Bureau, since PG&E would have supplied no power.



the procedures prescribed above (Part II.D.(2)), what Santa Clara's allocation during the withdrawal period *would* have been had it been determined in accordance with the requirements of due process. If the existing scheme survives, PG&E will be entitled to the fund. On the other hand, if a different allocation scheme is adopted, it will be necessary to adjust the parties' rights to the fund in accordance with that scheme.[50]

E. *Violation of National Environmental Policy Act.*

Santa Clara finally alleges that defendants' actions in (1) withdrawing CVP power from the City, beginning in 1971, and (2) determining not to grant the City a long-term, non-withdrawable allocation of CVP power, are within the category of government actions for which an environmental impact statement (EIS) is required by NEPA, specifically Section 102(2)(C) thereof, 42 U.S.C. § 4332(2)(C), and that no such statement has been prepared. This section provides, in part:

> The Congress authorizes and directs that, to the fullest extent possible: . . .
>
> (2) all agencies of the Federal Government shall
>
> • • •
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the hu-

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[50] This will necessitate an estimate, under the newly-adopted scheme, of what amount of power Santa Clara would have been receiving from CVP in mid-1971 and subsequent months. Assuming that under any scheme adopted which differs from the present one, Santa Clara would have received more power in 1971 and thereafter than it did under the existing scheme, then PG&E's share of the fund will be reduced and will be the power rate charged for the City's total requirements minus the CVP power which *would have been received* had the new plan been in effect, rather than the total fund amount as it now stands.

man environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The City contends that the government's action in withdrawing power and in refusing to grant a long-term allocation are "major federal actions" which "significantly affect the quality of the human environment" in that if Santa Clara cannot get low-cost CVP power, it will have to install its own generating facilities or seek power from other suppliers with finite generating resources, either of which will adversely affect the environment, and further that the loss of low-cost federal power will increase power and energy rates to its customers, leaving "diminished resources for Santa Clara to maintain essential services and a pleasing and healthful cultural and physical environment within which to work and prosper". Defendants see NEPA inapplicable as a matter of law.

Ours is a task of construing the statutory language. For the reasons set forth below, the court is of the opinion that the government's actions here were not "major federal actions significantly affecting the quality of the human environment". Hence NEPA, and its requirements of an EIS, are not applicable to the Bureau's actions.



The federal action here consisted of adopting a plan to disseminate limited low-cost federal power, which plan did not leave Santa Clara with as much power as it wanted, or as much as some other municipalities received. The responsible officials decided that their actions in providing only partially for Santa Clara's total power needs fell without the purview of NEPA. Under the law this decision is to be measured against a standard of reasonableness. *Save Our Ten Acres v. Kreger,* 472 F.2d 463, 467 (5th Cir. 1973).[51]

It cannot be denied that if Santa Clara's power needs are not satisfied by the federal government, the City will have to look elsewhere for power if it intends to continue serving its citizens. Much the same can be said of every city in the United States. It is equally undeniable that as more and more power is needed by the nation, generating facilities of some type, be they nuclear, thermal, or hydroelectric, will have to be constructed, and the presence of such installations will undoubtedly significantly affect the environment. What is not so clear, however, is that the government's allocating a finite quantity of power to one city or a group of cities, instead of to another, significantly affects the quality of the human environment, within the intendment of the NEPA provisions. This is not a case where a power plant is proposed for construction, or even a case where it is proposed to increase the capacity of an existing plant. Nothing was built, dammed, re-routed, or torn down. Electric power was simply or-

[51] Use of this standard will give plaintiff the benefit of the doubt as to what the law really is. Views of courts as to the standard of review of this threshold determination have varied widely. See, e.g., *Hanly v. Kleindienst,* 471 F.2d 823 (2d Cir. 1972) ("arbitrary, capricious"); *Scherr v. Volpe,* 336 F.Supp. 886 (W.D.Wis.1971), aff'd, 466 F.2d 1027 (7th Cir. 1972) (de novo review); *Goose Hollow Foothills League v. Romney,* 334 F.Supp. 877 (D.Or. 1971) (arbitrary, capricious); *Echo Park Residents Comm. v. Romney,* 2 Env.L.Rep. 20337 (C.D.Cal. 1971) (arbitrary).

dered sent through some existing power lines and not others.

The effect of the government's not supplying Santa Clara with its full power needs will be felt by the environment in some manner. That cannot be disputed. Assume the worst of several possibilities: that Santa Clara presently undertakes to build a power plant. Such an action, were it federal, would require an EIS. But the government's "non-action" in not supplying power to the City is not tantamount to building a power plant. Can it realistically be said that an EIS is required every time the federal government decides *not* to build a nuclear power plant at a certain location? Surely the intendment of Congress in enacting NEPA was precisely the opposite. NEPA was designed to force decision-makers to consider the environmental impact every time an environment-changing decision is made. The governmental decision here did not and does not change the environment any more than it would change without the government action.

> [I]n deciding whether a major federal action will "significantly" affect the quality of the human environment, the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in *excess* of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.

*Hanly v. Kliendienst*, 471 F.2d 823, 830-31 (2d Cir. 1972) (emphasis added). Since the demand for CVP power exceeds the available supply, if the full demand must be met, which it apparently must, then the steps taken to meet



that demand might well effect the environment. But those steps are not being taken here by the federal government. *Its* actions in giving out what power it has available do not affect the environment; what affects the environment is that more power than the federal government has is needed, and will have to be sought by others. *Those* actions may affect the environment, but they are not the subject of this complaint. The court holds that there has been no violation of NEPA.

### III. *Conclusion.*

For the foregoing reasons, defendants' motion for summary judgment on the due process issues, plaintiff's motion for summary judgment on the due process issues, and PG&E's motion for summary judgment on its counterclaim must all be denied. Defendants' motion for summary judgment on the NEPA issue is granted.

In addition, given the nature of the disposition of this case, remanding the power allocation scheme issue to the Department of the Interior, the court at this time dismisses the action in its entirety (with exception of the NEPA issue) without prejudice, in the expectation that once the Department complies with the procedural safeguards prescribed above, continued controversy may well not exist.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF SANTA CLARA, CALIFORNIA, Plaintiff,
Counter-Defendant and Designated Appellant,

vs.

CECIL ANDRUS, ET AL., Defendants and Designated Appellees,

and

PACIFIC GAS AND ELECTRIC COMPANY, Intervenor-Defendant,
Counter-claimant and Designated Appellee.

Nos. 76-3670, 77-1110, 77-1189, 77-1270

**Order Staying Issuance of Mandate**

Upon application of CHARLES A. FERGUSON-LAWRENCE, EDWIN MOORE, & MAX VASSANELLI, ESQUIRES, counsel for all parties, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above case be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for a writ of certiorari to be made by all parties herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before May 25, 1978. B.C.D.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ BEN DUNIWAY
Ben C. Duniway
United States Circuit Judge.

Dated: San Francisco, Calif.
April 17, 1978



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF SANTA CLARA, CALIFORNIA, Plaintiff,
Counter-Defendant and Designated Appellant,

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Nos. 76-3670, 77-1110, 77-1189, 77-1270

**Order Staying Issuance of Mandate**

Upon application of CHARLES A. FERGUSON-LAWRENCE, FRED PALMER & MAX VASSANELLI, counsel for all parties above, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above case be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for a writ of certiorari to be made by all parties listed above herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before July 3, 1978.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ BEN DUNIWAY
Ben C. Duniway
United States Circuit Judge.

Dated: San Francisco, Calif.
June 6, 1978

## Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



## Statutes Involved

**5 U.S.C. § 552. Public information: agency rules, opinions, orders, records, and proceedings**

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected

thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

**5 U.S.C. § 553. Rule making**

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) To interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public



procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

**5 U.S.C. § 701. Applications; definitions**

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within

or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

**16 U.S.C. § 825s. Sale of electric power from reservoir projects; rate schedules; preference in sale; construction of transmission lines; disposition of moneys**

Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with



sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

**43 U.S.C. § 485h(c)**

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided,* That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in

the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further,* That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.